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Supreme Court, U.S.
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No. 96-____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

Brian R. Zimmerman, *et al.*,

Petitioners,

v.

Volkswagen of America, Inc., and
Volkswagen Aktiengesellschaft,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Idaho

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the National Traffic and Motor Vehicle Safety Act preserves common law claims from federal preemption by expressly stating that "[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law," 15 U.S.C. § 1397(k); or whether, as the Supreme Court of Idaho held, *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), requires a finding that common law claims are preempted whenever an auto manufacturer complies with a Federal motor vehicle safety standard?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 4

REASONS FOR GRANTING THE WRIT 7

1. There Is An Irreconcilable Conflict Among the Federal Courts of Appeal and the State Courts of Last Resort Over Whether the Safety Act Preempts Common Law Claims. . . 7

2. This Court's Decision in *Freightliner* Has Caused Great Confusion Over Whether the Safety Act Preempts Common Law Claims. . 16

3. Whether the Safety Act Preempts Common Law Claims is An Important Question of Federal Law. 22

CONCLUSION 26

TABLE OF AUTHORITIES

Cases

Alvarado v. Hyundai Motor Company, 908 S.W.2d 243 (Tex. Ct. App. 1995), *appeal pending*, No. 95-0969 (Tex.) 16

Arbet v. Gussarson, 66 Wis. 2d 551, 225 N.W.2d 431 (1976) 9, 10

Attocknie v. Carpenter Manufacturing, Inc., 901 P.2d 221 (Okla. App. 1995) 16

Boyle v. Chrysler Corp, 501 N.W.2d 865 (Wis. Ct. App. 1993) 16

Buzzard v. Roadrunner Trucking, Inc., 966 F.2d 777 (3d Cir. 1992) 12

Cellucci v. General Motors Corp., 676 A.2d 253 (Pa. Super. 1996), *review granted*, No. 0379 (Pa. Oct. 22, 1996) 16

Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *rev'd in part and aff'd in part*, 112 S. Ct. 2608 (1992) 10, 17

Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608 (1992) 10, 13, 18-21, 25

Cooper v. General Motors Corp., No. 92-CA-01334-SCT, 1996 WL 272363 (Miss. 1996), *petition for reconsideration pending* (filed June 19, 1996) 12, 13, 15, 22

Dawson v. Chrysler Corp., 630 F.2d 950
(3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981) . . 8, 9, 12

Dorsey v. Honda Motor Co. Ltd., 655 F.2d 650
(5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982) 8, 10

Doyle v. Volkswagenwerk Aktiengelellschaft, 81 F.3d
139 (11th Cir. 1996) 14

Dykema v. Volkswagenwerk AG, 525 N.W.2d 754
(Wis. Ct. App. 1994), *cert. den.*, No. 94-1910, 1995
WL 334794 (Oct. 2, 1995) 16

Ford Motor Company v. Tebbetts, 165 A.2d 345
(N.H. 1995), *cert. denied*, 116 S. Ct. 773 (1996) 14

Fox v. Ford Motor Co., 575 F.2d 774
(10th Cir. 1978) 8, 10, 11

Freightliner Corp. v. Myrick, 115 S. Ct. 1483 (1995) . . . *passim*

General Motors Corp. v. Edwards, 482 So. 2d 1176
(Ala. 1985) 8, 9, 10

H.P. Hood & Sons, Inc. v. Ford Motor Co.,
370 Mass. 69, 345 N.E.2d 683 (1976) 9

Hernandez-Gomez v. Volkswagen of America, Inc.,
884 P.2d 183 (Ariz. 1994), *vacated and remanded*,
115 S. Ct. 1819 (1995) 15, 20

Hernandez-Gomez v. Volkswagen of America, Inc.,
917 P.2d 236 (Ariz. 1996) 15, 20, 21

Ketchum v. Hyundai Motor Company, _ P.2d _,
No. B077874 (Cal. Ct. App. Oct. 11, 1996) 16

Kitts v. General Motors Corp., 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990) 11, 12, 17

Knippen v. Ford Motor Co., 546 F.2d 993 (D.C. Cir. 1976) 8, 10

Larsen v. General Motors Corporation, 391 F.2d 495 (8th Cir. 1968) 8

Loulos v. Dick Smith Ford, Inc., 882 S.W.2d 149 (Mo. Ct. App. 1994) 16

Marrs v. Ford Motor Co., 852 S.W.2d 570 (Tex. Ct. App. – Dallas 1993, no writ) 16

Medtronic, Inc. v. Lohr, 116 S. Ct. 2240 (1996) 23, 25, 26

Minton v. Honda of America Mfg. Inc., 1996 WL 402070 (Ohio App. 1996) *review granted*, No. 96-2006 (Ohio Oct. 23, 1996) 16

Miranda v. Fridman, 647 A.2d 167 (N.J. Super. Ct. App. Div.), *cert. den.*, 649 A.2d 1291 (N.J. 1994) 16

Montag v. Honda Motor Co. Ltd., 75 F.3d 1414 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996) 11

Muntz v. Commonwealth of Pennsylvania, 674 A.2d 238 (Pa. Commw. Ct. 1996) 16

Myrick v. Fruehauf Corp., 13 F.3d 1516 (11th Cir. 1994), *aff'd sub nom. on other grounds Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995) 13, 18, 19

Nelson v. Ford Motor Company, 670 N.E. 2d 307 (Ohio Ct. App. 1996), *review granted*, No. 96-2006 (Ohio Oct. 23, 1996) 16

Nissan Motor Corp v. Superior Court, 261 Cal. Rptr. 80 (Cal. Ct. App. 1989) *cert. den.*, 494 U.S. 1066 (1990) . . . 16

Palmer v. Liggett Group, Inc., 825 F.2d 620 (1st Cir. 1987) 17

Panarites v. Williams, 629 N.Y.S. 2d 359 (N.Y. App. Div. 1995) 16

Perry v. Mercedes Benz of North America, 957 F.2d 1257 (5th Cir. 1992) 14

Pokorny v. Ford Motor Co., 902 F.2d 1116 (3d Cir. 1990) 12, 17

Schwartz v. American Honda Motor Co., Inc., 710 F.2d 378 (7th Cir. 1983) 8

Shipp v. General Motors Corp., 750 F.2d 418 (5th Cir. 1985) 8, 10

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 24

Sours v. General Motors Corp., 717 F.2d 1511 (6th Cir. 1983) 8, 10

Stephen v. American Brands, Inc., 825 F.2d 312 (11th Cir. 1987) 17

Stonehocker v. General Motors Corp., 587 F.2d 151 (4th Cir. 1978) 8

Taylor v. General Motors Corp., 875 F.2d 816 (11th Cir. 1989), *cert. denied*, 495 U.S. 1065 (1990), *rev'd in part, Myrick v. Fruehauf Corp*, 13 F.3d 1516 (11th Cir. 1994), *aff'd sub nom. on other grounds Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995) 13, 17, 19

Volkswagen of America, Inc. v. Young, 272 Md. 201, 321 A.2d 737 (Md. App. 1974) 8, 9, 10

Wilson v. Pleasant, 660 N.E.2d 327 (Ind. 1995) 14, 22, 23

Wood v. General Motors Corp., 865 F.2d 395 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990) 11, 12, 17

Statutes and Legislative Materials

15 U.S.C. §§ 1381 *et seq.* 1, 4

15 U.S.C. § 1392(d) . . . . . *passim*

15 U.S.C. § 1397(k) . . . . . *passim*

28 U.S.C. § 1257 1

49 U.S.C. § 30103 . . . . . 2, 3

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) 24

Pub. L. No. 103-272, 108 Stat. 745, 941 2

Regulations

49 C.F.R. § 571.208 5

Miscellaneous

Ford Motor Company v. Tebbetts, No. 95-709 (October Term, 1995), Brief of the American Automobile Manufacturers Association and the Association of International Automobile Manufacturers, Inc. as *Amici Curiae* Supporting the Petition 23

Freightliner Corp. v. Myrick, No. 94-286 (October Term, 1994), Brief for the United States as *Amicus Curiae* Supporting Respondents 24

OPINIONS BELOW

The opinion of the Supreme Court of Idaho (App. 1-12) is reported at 920 P.2d 67. The order of the state district court granting defendants' motion for summary judgment (App. 13-15) and the order of the Supreme Court of Idaho denying petitioners' motion for rehearing (App. 16) are not reported. On October 15, 1996, petitioners were granted an extension of time until December 6, 1996, to file this petition.

JURISDICTION

The Supreme Court of Idaho entered judgment on May 24, 1996. App. 1. Rehearing was denied on August 8, 1996. App. 16. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS INVOLVED

The National Traffic and Motor Vehicle Safety Act, as codified when the vehicle at issue in this case was manufactured, provided in pertinent part:

> **15 U.S.C. § 1392(d). Supremacy of Federal standards; allowable higher standards for vehicles used by Federal or state governments.** Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard. Nothing in this section shall be construed as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. Nothing in

this section shall be construed to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use if such requirement imposes a higher standard of performance than that required to comply with the otherwise applicable Federal standard.

* * * *

15 U.S.C. § 1397(k). Continuation of common law liability. Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

On July 5, 1994, Congress recodified the Act "without substantive change" (Pub. L. No. 103-272, 108 Stat. 745, 941). The new Code provisions, in relevant part, are as follows:

49 U.S.C. § 30103. Relationship to other laws.

(b) **Preemption.** (1) When a motor vehicle safety standard is in effect under this chapter, a State or a political subdivision of a State may prescribe or continue in effect a standard applicable to the same aspect of performance of a motor vehicle or motor vehicle equipment only if the standard is identical to the standard prescribed under this chapter. However, the United States Government, a State, or a political subdivision of a State may prescribe a standard for a motor vehicle or motor vehicle equipment obtained for its own use that imposes a higher performance requirement than that required by the otherwise

applicable standard under this chapter.

(2) A State may enforce a standard that is identical to a standard prescribed under this chapter.

* * * *

(e) **Common Law Liability.** Compliance with a motor vehicle safety standard prescribed under this chapter does not exempt a person from liability at common law.

All of the applicable preemption cases, including the decisions by the two courts below, discuss the provisions as codified before the 1994 recodification. This petition, therefore, uses the citations employed in those decisions.

STATEMENT OF THE CASE

On March 24, 1989, Dorothy Zimmerman was making a left turn in her 1987 Volkswagen Golf when a pick-up truck collided with her car. Ms. Zimmerman's Volkswagen was equipped with an automatic shoulder harness (anchored to the seat on her right and the door on her left) and a padded knee bar under the dash (designed to keep the driver in place), but it was not equipped with a lap belt. As a result, Ms. Zimmerman was thrown into the shoulder harness, which lacerated her liver. She later died of internal hemorrhaging caused by the laceration. App. 2.

On December 13, 1990, Ms. Zimmerman's husband, children, and mother (collectively, "the Zimmermans") filed this state common law suit for strict liability in tort against Volkswagen of America, Inc., and Volkswagen Aktiengesellschaft (collectively, "VW"), alleging that the 1987 Volkswagen Golf was defectively designed because it lacked a driver's-side lap belt. The suit further alleges that, if the car had not been defectively designed, Ms. Zimmerman would have survived the crash.[1]

When the 1987 Volkswagen Golf driven by Dorothy Zimmerman was manufactured, federal regulations promulgated pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, 15 U.S.C. §§ 1381 *et seq.* ("the Safety Act") -- specifically, Federal Motor Vehicle Safety Standard 208 -- did not prohibit VW from installing a lap belt in the Volkswagen Golf or any other car. Standard 208 did, however, require VW to install some form of passive restraint in at least 10 percent of its 1987 model-year cars. 49 C.F.R. § 571.208. It also required all cars to have, at a minimum, either (1) a manual lap belt and shoulder harness, (2) an automatic belt system providing at least a specified level of protection in head-on crashes, or (3) an airbag or other device

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[1] The Zimmermans also sued the driver and owner of the pick-up truck and the Volkswagen dealer who sold the car to Ms. Zimmerman. The claims against those defendants have been resolved.

providing automatic protection in both head-on and angular crashes. *Id.* VW chose the second option, installing an automatic belt system in the 1987 Golf, but did not include a lap belt with the system, although it was free to do so under that option. In this case, the Zimmermans allege that VW acted negligently by failing to do more than the minimum that Standard 208 required.

On August 2, 1993, VW moved for summary judgment on federal preemption grounds, asserting that, even if VW's actions violated Idaho common law and caused Dorothy Zimmerman's death, VW is exempt from liability because it complied with Standard 208. VW argued, among other things, that the Zimmermans' claims are expressly preempted by the Safety Act's preemption clause, 15 U.S.C. § 1392(d), which provides, *inter alia*:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

The Zimmermans responded, in part, by relying on the Safety Act's anti-preemption (or savings) clause, 15 U.S.C. § 1397(k), which provides: "Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." They contended that Congress' plain words precluded any finding of preemption and that, in any event, their claims simply did not conflict with federal law.

On October 20, 1993, the trial court granted VW's motion. In a three-page order, it held plaintiffs' claims both expressly and impliedly preempted. App. 14.

On May 24, 1996, the Supreme Court of Idaho unanimously affirmed. Based on this Court's ruling in *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995) (*"Freightliner"*), it held that plaintiffs' claims are expressly preempted by the Safety Act. Explaining its reasoning, the Supreme Court of Idaho noted that, in *Freightliner*, this Court found that the Safety Act did not expressly preempt common law claims alleging a negligent failure to install anti-lock brakes in trucks because there was no federal standard in effect under the Act governing the aspect of vehicle performance (truck stopping distances) involved in the case. App. 7 (citing *Freightliner*, 115 S. Ct. at 1487). In this case, however, a federal standard -- Standard 208 -- is in effect. Given that fact, the Supreme Court of Idaho concluded that *Freightliner* required a finding of express preemption:

> Implicit in the [U.S. Supreme] Court's rejection of express preemption in *Freightliner* is its recognition of the preemptive effect of Section 1392(d) in those cases where a standard specifically addresses the aspect of performance in question. In this action there exists a federal standard that directly addresses the performance requirements of automobile restraint systems to protect vehicle occupants during crashes. Hence we find . . . that the claims against Volkswagen for failure to include a lap belt with [its system] are preempted by the express provisions of the Safety Act.

App. 7. Because it found the Zimmermans' common law claims expressly preempted, the Supreme Court of Idaho did not address VW's "contention that these claims are impliedly preempted as well." App. 7.

REASONS FOR GRANTING THE WRIT

When Congress enacted the Safety Act in 1966, it unequivocally stated the preemptive effect that compliance with a Federal safety standard was to have on common law liability: "Compliance with *any* Federal motor vehicle safety standard issued under this subchapter does not exempt *any* person from *any* liability under common law." 15 U.S.C. § 1397(k) (emphasis added). The Supreme Court of Idaho's express preemption decision contravenes these plain words and conflicts with the ruling of every federal appeals court and state court of last resort to address the preemption issue. In so doing, it both adds to and exacerbates the conflict that already exists among these courts on whether -- and the extent to which -- Congress' words preclude a finding that common law claims are impliedly preempted. The Supreme Court of Idaho's express preemption decision also demonstrates, and increases, the confusion created by this Court's decision in *Freightliner* about the Safety Act's preemptive effect. Finally, the Supreme Court of Idaho's decision incorrectly answers an important federal question that has not been, but should be, decided by this Court -- whether Congress intended the Safety Act to preempt state common law claims. This Court should grant review to resolve the conflict among the federal courts of appeal and state courts of last resort, eliminate the confusion caused by *Freightliner*, and decide whether Congress' words mean what they say.

1. There Is An Irreconcilable Conflict Among the Federal Courts of Appeal and the State Courts of Last Resort Over Whether the Safety Act Preempts Common Law Claims.

The Supreme Court of Idaho's express preemption decision massively expands and exacerbates the growing conflict among the federal courts of appeal and the state courts of last resort over the Safety Act's preemptive effect. Only this Court can bring the conflict to an end. If this Court does not step in, the conflict will only get worse, as the decision below reflects.

The Safety Act was enacted in 1966. During its first two decades, eight federal circuit courts and five state courts of last resort addressed whether compliance with federal motor vehicle safety standards issued pursuant to the Safety Act exempts auto manufacturers from liability under common law. Some phrased the question as whether compliance with federal standards constitutes a defense; others asked whether compliance results in federal preemption. Each, however, reached the same conclusion: Congress' words mean what they say -- "Compliance with any federal motor vehicle safety standard adopted under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

Thus, in the first such case to reach a federal court of appeals, *Larsen v. General Motors Corporation*, 391 F.2d 495, 506 (8th Cir. 1968), the Eighth Circuit stated:

> Section 108(c) of the Act, 15 U.S.C. § [1397(k)], expressly negatives any intention of Congress to acquire exclusive jurisdiction in this field and leaves the common law liability intact . . . It is apparent that the National Traffic Safety Act is intended to be supplementary of and in addition to the common law of negligence and product liability.

Accord Knippen v. Ford Motor Co., 546 F.2d 993, 1000 (D.C. Cir. 1976); *Fox v. Ford Motor Co.*, 575 F.2d 774, 778 (10th Cir. 1978); *Stonehocker v. General Motors Corp.*, 587 F.2d 151, 156-57 (4th Cir. 1978); *Dawson v. Chrysler Corp.*, 630 F.2d 950, 957-58 (3d Cir. 1980), *cert. denied*, 450 U.S. 959 (1981); *Dorsey v. Honda Motor Co. Ltd.*, 655 F.2d 650, 656-57 (5th Cir. 1981), *cert. denied*, 459 U.S. 880 (1982); *Schwartz v. American Honda Motor Co., Inc.*, 710 F.2d 378, 383 (7th Cir. 1983); *Sours v. General Motors Corp.*, 717 F.2d 1511, 1516-17 (6th Cir. 1983); *Shipp v. General Motors Corp.*, 750 F.2d 418, 421 (5th Cir. 1985); *General Motors Corp. v. Edwards*, 482 So. 2d 1176, 1198 (Ala. 1985); *Volkswagen of*

America, Inc. v. Young, 272 Md. 201, 321 A.2d 737, 746 (Md. App. 1974); *H.P. Hood & Sons, Inc. v. Ford Motor Co.*, 370 Mass. 69, 345 N.E.2d 683, 688 (1976); *Arbet v. Gussarson*, 66 Wis. 2d 551, 225 N.W.2d 431, 438 (1976).

In several of these cases, the plaintiffs' claims, if successful, might arguably have prompted the manufacturers to alter their conduct on a nationwide basis. The courts were aware of this fact, and sometimes questioned Congress' judgment, but nevertheless concluded that Congress had, indeed, intended to preserve such common law claims. For example, in *Dawson*, 630 F.2d at 962-63, the jury found that a side-door design provided inadequate crash protection despite the fact that it complied with Standard 214. The Third Circuit stated:

> The effect of [15 U.S.C. § 1397(k)] is that the states are free, not only to create various standards of liability for automobile manufacturers with respect to design and structure, but also to delegate to the triers of fact in civil cases arising out of automobile accidents the power to determine whether a particular product conforms to such standards. . . In effect, this permits individual juries applying varying laws in different jurisdictions to set nationwide automobile safety standards . . . *Inasmuch as it was the Congress that designed the system, and because Congress is the body best suited to evaluate and, if appropriate, to change the system, we decline today to do anything in this regard except to bring the problem to the attention of the legislative branch.*

Dawson, 630 F.2d at 962-63 (emphasis added).

Similarly, in *General Motors Corporation v. Edwards*, 482 S.2d at 1180, the jury found that the placement of the gas tank in

the "crush zone" between the rear bumper and axle was negligent, despite its compliance with Standard 301. Affirming the verdict, the Supreme Court of Alabama noted that the jury's decision had "potential national implications," but, fully in keeping with Congress' intent, "refuse[d] to . . . hold" that the standards set by the federal government were "conclusive." *See also Knippen*, 546 F.2d at 1000 (turning signal and parking light design complying with Standard 108 found defective); *Dorsey*, 655 F.2d at 656-57 (numerous design aspects complying with federal standards found insufficiently crashworthy); *Shipp*, 750 F.2d at 421 (roof design complying with Standard 216 found insufficiently crush-resistant); *Sours*, 717 F.2d at 1516-17 (same as *Shipp*); *Fox*, 575 F.2d at 778 (rear passenger restraint system found defective because it lacked rear shoulder harnesses, which Standard 209 did not require); *Volkswagen*, 321 A.2d at 746 (fuel tank design complying with Standard 301 found insufficiently crush-resistant); *Arbet*, 225 N.W. 2d at 438 (same as *Volkswagen*).

In the past decade, however, the federal appeals courts and state courts of last resort have dramatically split -- both from their prior rulings and with each other -- over whether compliance with federal standards adopted under the Safety Act exempts manufacturers from liability under common law, particularly in cases involving the failure to install lap belts, shoulder harnesses, and/or airbags. As a result, after twenty years of harmony regarding the Safety Act's preemptive effect, the courts are now hopelessly in conflict over (a) whether the Safety Act expressly preempts common law claims, (b) whether the Safety Act's savings clause precludes resort to implied preemption analysis, (c) whether the Safety Act impliedly preempts common law claims, and (d) if it does, which ones and why.[2]

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[2] The reasons why this conflict developed in the last decade -- the Third Circuit's improper expansion of implied preemption in *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *rev'd in part and aff'd in part*, 112 S. Ct. 2608 (1992), and the confusion caused by this Court's decision in *Freightliner*, 115 S. Ct. at 1483 -- are reviewed in Section 2 below.

Thus, three federal courts and one state supreme court have held that the Safety Act does not *expressly* preempt common law claims, but does *impliedly* preempt them. These courts, moreover, have adopted widely varying implied preemption theories, some of which extend way beyond claims involving a failure to install lap belts, shoulder harnesses, or airbags.

In the first such case, *Wood v. General Motors Corp.*, 865 F.2d 395, 410 (1st Cir. 1988), *cert. denied*, 494 U.S. 1065 (1990), the First Circuit held that the Safety Act does not expressly preempt any common law claims, but that it impliedly preempts *design defect* claims. It noted that section 1392(d), as written, would preempt a state regulation requiring the installation of airbags in all cars and conceded that section 1397(k), as written, preserved all common law claims, including claims challenging the manufacturer's failure to install an airbag. It could see no reason, however, why Congress would have wanted to preserve common law claims that might have the same regulatory effect as a regulation that section 1392(d) would preempt. It, therefore, concluded that Congress must have written both sections as it did because, in 1966, "the only kind of legal claim which could give rise to the present dilemma -- a cause of action based upon alleged automobile design defect -- had yet to take its place in the arsenal of the plaintiffs' bar." *Wood*, 865 F.2d at 402. It found plaintiffs' "no-airbag" claim impliedly preempted on a theory that would preempt almost all design defect claims.

In *Kitts v. General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), *cert. denied*, 494 U.S. 1065 (1990), the Tenth Circuit simply adopted the First Circuit's ruling in *Wood*, without explaining how this result comported with its 1976 affirmance of the verdict in *Fox v. Ford Motor Company*, 575 F.2d at 778, the rear shoulder harness case. Just eleven months ago, the Tenth Circuit reaffirmed its commitment to *Kitts* in *Montag v. Honda Motor Co. Ltd.*, 75 F.3d 1414, 1417 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996).

The Third Circuit also found implied preemption under the Safety Act, but on much more narrow grounds. In *Pokorny v. Ford Motor Co.*, 902 F.2d 1116, 1121 n.6 (3d Cir. 1990), it disagreed with both *Wood* and *Kitts* and held that common law claims alleging a failure to install airbags or automatic safety belts are impliedly preempted because, in its view, Standard 208 gave manufacturers the option not to install those types of passive restraints. *Pokorny*, 902 F.2d at 1123-25, 1126 n.11. It ruled, however, that common law claims alleging a failure to install protective netting are not preempted because Standard 208 did not give manufacturers the option not to install *that* type of passive restraint. *Id.* at 1126. It distinguished its prior ruling in *Dawson*, 630 F.2d at 957-58, on the (incorrect) ground that "there was no federal standard governing the particular design said to be defective in *Dawson*, and thus there was no asserted conflict between federal standards and common law liability." *Pokorny*, 902 F.2d at 1122. More recently, the Third Circuit has made clear that its implied preemption rationale in *Pokorny* affects cases involving other design defect claims, too. In *Buzzard v. Roadrunner Trucking, Inc.*, 966 F.2d 777 (3d Cir. 1992), it held that, under *Pokorny*, Standard 108 (which establishes minimum illumination requirements for vehicles) does not impliedly preempt all common law claims relating to illumination and lighting equipment, but does limit the *type* of claims related to those matters that can be pursued. *Buzzard*, 966 F.2d at 784 n.11.

The Supreme Court of Mississippi has also found implied preemption of common law claims challenging an auto manufacturer's failure to install an airbag. *Cooper v. General Motors Corp.*, No. 92-CA-01334-SCT, 1996 WL 272363 (Miss. 1996), *petition for reconsideration pending* (filed June 19, 1996). In broad language that effectively read the savings clause out of the Safety Act, it said:

> This federal law . . . has a preemption clause that prohibits any conflicting state laws on the same matter, and a savings clause permitting any state

> common law actions. We do not see a conflict in these two sections. It does not take a genius to figure out that the preemption clause tells states that they cannot have any nonidentical laws on any area which is being governed by federal regulations, and *for those areas in which there are no regulations, the states can still apply their common law.* The savings clause merely underscores the right of consumers to bring nonpreempted common law claims; it does not undermine the explicit preemptive language in the statute.

Cooper, 1996 WL 272363 at *16 (emphasis added). A vigorous dissent aptly observed, "Perhaps the majority should instead refer to the Safety Act as the 'Automobile Manufacturer Limited Liability Act' or the 'Automobile Manufacturer Profit Protection Act.'" *Id.* at *19.

Like the four foregoing courts, the Eleventh Circuit once held that the Safety Act impliedly preempts common law claims, but it has since reversed course. In *Taylor v. General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), *cert. denied* 495 U.S. 1065 (1990), *rev'd in part, Myrick v. Fruehauf Corp*, 13 F.3d 1516 (11th Cir. 1994), *aff'd sub nom. on other grounds Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), the Eleventh Circuit held common law claims involving the failure to install airbags impliedly preempted because they "frustrate the federal regulatory scheme." *Taylor*, 875 F.2d at 827. Two years ago, however, the Eleventh Circuit held in *Myrick v. Fruehauf Corp.*, 13 F.3d 1516 (11th Cir. 1994), *aff'd sub nom. on other grounds Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), that this Court's decision in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. at 2608, negated its implied preemption ruling in *Taylor* and that the Safety Act expressly preserves all common law claims. This Court affirmed the ruling in *Myrick* on other grounds in *Freightliner* and, eight months ago, the Eleventh Circuit reiterated its holding in *Myrick*

that "standards promulgated under the National Traffic and Motor Vehicle Safety Act do *not* preempt common law claims." *Doyle v. Volkswagenwerk Aktiengelellschaft*, 81 F.3d 139, 141 (11th Cir. 1996) (emphasis in original).

The Fifth Circuit reached a similar conclusion in *Perry v. Mercedes Benz of North America*, 957 F.2d 1257 (5th Cir. 1992), which held that, when an airbag system has been installed, a state common law claim for defective design of the system is not preempted. *Id.* at 1264. *Perry* did not reach the issue of whether the Safety Act preempts common law claims complaining of the simple failure to install an airbag, lap belt, or shoulder harness. *Id.* at 1265.

Three state supreme courts, however, *have* reached that issue and each has found no preemption -- in direct contrast to the First, Tenth, and Third Circuits, and the Mississippi Supreme Court. In *Ford Motor Company v. Tebbetts*, 165 A.2d 345 (N.H. 1995), *cert. denied* 116 S. Ct. 773 (1996), the Supreme Court of New Hampshire held that section 1397(k) plainly evidences Congress' intent to preserve *all* common law claims, including claims involving the failure to install airbags, and bars any finding of express or implied preemption.

The Supreme Court of Indiana agrees. In *Wilson v. Pleasant*, 660 N.E.2d 327 (Ind. 1995), it found section 1397(k) conclusive, too, and held that the auto manufacturer's implied preemption arguments could not be considered. The Supreme Court of Indiana discussed in detail -- and noted its disagreement with -- the federal appeals court decisions finding implied preemption. *Id.* at 334-39. It held that, even if the manufacturer's implied preemption arguments could be considered, they had to be rejected, since there is no conflict between Standard 208 and a common law claim alleging negligent failure to install an airbag. *Id.* at 339.

The Supreme Court of Arizona also ruled that section 1397(k) requires a finding of no preemption and bars implied preemption analysis in a case, like the instant one, involving VW's failure to include a lap belt in one of its cars. *Hernandez-Gomez v. Volkswagen of America, Inc.*, 884 P.2d 183 (Ariz. 1994), *vacated and remanded*, 115 S. Ct. 1819 (1995). After this Court vacated and remanded that decision for reconsideration in light of *Freightliner*, the Supreme Court of Arizona again found no preemption. *Hernandez-Gomez v. Volkswagen of America, Inc.*, 917 P.2d 236 (Ariz. 1996). This time, however, it issued a split decision, with the majority finding that implied preemption *might* (or might not) be considered, but that, even if it is, implied preemption cannot be found in cases involving cars that roll over, since VW complied with a portion of Standard 208 that only addresses front-end crashes. *Id.* at 246.

While the foregoing appellate courts conflict starkly over whether the Safety Act *impliedly* preempts any common law claims (and, if so, on what basis), the federal appeals courts and state courts of last resort unanimously agreed that the Safety Act does not *expressly* preempt any common law claims -- until the ruling by the Supreme Court of Idaho in this case.[3] As a result of the ruling below, the range of the conflict is now complete. The federal appeals courts and state courts of last resort now disagree about virtually every aspect of the preemption dispute.

This ongoing dispute about the Safety Act's preemptive effect has serious practical consequences. There are currently thousands of automobile design defect lawsuits pending throughout the nation, hundreds of which involve the manufacturers' failure to install lap belts, shoulder harnesses, and/or airbags. The preemption issue has been raised or is lurking in each of these

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[3] *But see Cooper v. General Motors Corp*, 1996 WL 272362 at *5 ("In the case sub judice, there appears to be both express preemption, under § 1392(d), and implied preemption . . . [but] this Court will filter this case through an implied preemption grid.").

cases. The legal and judicial resources being spent on this issue are mushrooming rapidly, with no end to the conflict in sight.[4]

The time has come for this Court to end this conflict. To do so, it should grant review in this case. If it does not, the conflict will only continue, primarily because of the confusion created by *Freightliner*.

2. This Court's Decision in *Freightliner* Has Caused Great Confusion Over Whether the Safety Act Preempts Common Law Claims.

The reason that the lower courts continue to disagree about

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[4] At the state intermediate appeals court level, *see, e.g., Ketchum v. Hyundai Motor Company*, _ P.2d _, No. B077874 (Cal. Ct. App. Oct. 11, 1996) (no lap belt, no preemption, implied preemption barred); *Nissan Motor Corp v. Superior Court*, 261 Cal. Rptr. 80 (Cal. Ct. App. 1989) *cert. den.*, 494 U.S. 1066 (1990) (no airbag, implied preemption); *Loulos v. Dick Smith Ford, Inc.*, 882 S.W.2d 149 (Mo. Ct. App. 1994) (no airbag, no preemption, implied preemption barred); *Miranda v. Fridman*, 647 A.2d 167 (N.J. Super. Ct. App. Div.), *cert. den.*, 649 A.2d 1291 (N.J. 1994) (no lap belt, express preemption); *Panarites v. Williams*, 629 N.Y.S. 2d 359 (N.Y. App. Div. 1995) (no airbag, express and implied preemption); *Minton v. Honda of America Mfg. Inc.*, 1996 WL 402070 (Ohio App. 1996) *review granted*, No. 96-2006 (Ohio Oct. 23, 1996) (no airbag, implied preemption); *Nelson v. Ford Motor Company*, 670 N.E. 2d 307 (Ohio Ct. App. 1996), *review granted*, No. 96-2006 (Ohio Oct. 23, 1996) (no airbag, no preemption, implied preemption barred); *Attocknie v. Carpenter Manufacturing, Inc.*, 901 P.2d 221 (Okla. App. 1995) (no lap belt, no preemption, implied preemption barred); *Cellucci v. General Motors Corp.*, 676 A.2d 253 (Pa. Super. 1996) (en banc), *review granted*, No. 0379 (Pa. Oct. 22, 1996) (no airbag, implied preemption); *Muntz v. Commonwealth of Pennsylvania*, 674 A.2d 238 (Pa. Commw. Ct. 1996) (no airbag, no preemption); *Alvarado v. Hyundai Motor Company*, 908 S.W.2d 243 (Tex. Ct. App. 1995), *appeal pending*, No. 95-0969 (Tex.) (no lap belt, no preemption); *Marrs v. Ford Motor Co.*, 852 S.W.2d 570 (Tex. Ct. App. – Dallas 1993, no writ) (no airbag, implied preemption); *Dykema v. Volkswagenwerk AG*, 525 N.W.2d 754 (Wis. Ct. App. 1994), *cert. den.*, No. 94-1910, 1995 WL 334794 (Oct. 2, 1995) (no lap belt, express preemption); *Boyle v. Chrysler Corp*, 501 N.W.2d 865 (Wis. Ct. App. 1993) (no airbag, express preemption).

the Safety Act's preemptive effect is the confusion created by this Court's decision in *Freightliner* -- confusion which only this Court can eliminate. To appreciate why *Freightliner* caused such confusion, it is essential to understand the context in which *Freightliner* took place.

As we noted above, for twenty years after the Safety Act's 1966 enactment, the nation's appellate courts unanimously agreed that the Safety Act does not preempt common law claims. *See* pp. 8-9, *supra*. In 1986, however, the U.S. Court of Appeals for the Third Circuit issued its since-rejected decision in *Cipollone v. Liggett Group, Inc.*, 789 F.2d at 181, expanding the implied preemption doctrine to find certain common law claims involving cigarettes preempted despite Congress' intent to the contrary. Within a year, the First and Eleventh Circuits issued similar decisions. *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987); *Stephen v. American Brands, Inc.*, 825 F.2d 312 (11th Cir. 1987).

Before this Court had an opportunity to overturn these decisions, the defective strain of implied preemption analysis adopted in the cigarette cases infected the interpretation of the Safety Act. In 1988, the First Circuit heard *Wood*, 865 F.2d 395, in which General Motors was arguing, as it had repeatedly argued in the past, that it was exempt from common law liability because it had complied with a Federal motor vehicle safety standard -- specifically, Standard 208 governing occupant restraints. In a two-to-one decision, with Judge Selya dissenting, the First Circuit explicitly adopted the rationale of *Palmer*, its recent cigarette labeling decision, and became the first appeals court in the nation to find a common law claim impliedly (but not expressly) preempted by the Safety Act, despite Congress' clear statement of anti-preemptive intent. *Wood*, 865 F.2d at 410-11. In the next three years, the Third, Tenth, and Eleventh Circuits (and several lower courts) followed, albeit on varying rationales. *See Pokorny*, 902 F.2d at 1116; *Kitts*, 875 F.2d at 787; *Taylor*, 875 F.2d at 816.

In 1992, however, this Court issued its decision in *Cipollone*, 112 S. Ct. at 2608, explicitly rejecting the Third Circuit's (and its sister courts') expansion of the implied preemption doctrine. In a portion of the opinion joined by seven members of this Court, it said:

> In our opinion, the pre-emptive scope of the [two statutes at issue] is governed entirely by the express language in . . . each Act. When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions of the legislation.

112 S. Ct. at 2618. Thus, *Cipollone* held that the lower courts had erred in finding *implied* preemption of any common law claims involving cigarettes and that only *express* preemption analysis should have been employed. *Id.*

The *Cipollone* decision effectively overruled the decisions finding implied preemption under the Safety Act. It should have returned the lower courts to their unanimous view that the Safety Act expressly preserves all common law claims. And it probably would have done so, if not for the confusion caused by *Freightliner*.

In *Freightliner*, this Court reviewed the first decision by a federal appeals court or state court of last resort to interpret the Safety Act's preemptive effect after this Court's decision in *Cipollone*. In the decision being reviewed, *Myrick*, 13 F.3d at 1522, the Eleventh Circuit first stated *Cipollone*'s teaching broadly, noting "*Cipollone*'s clear instruction that when there is an express pre-emptive provision we should not consider implied

preemption."[5] It later said, however, that "at the very least" *Cipollone* "establishes there is a presumption that a pre-emption clause is a reliable indicium of congressional intent" and that, "[e]ven without such a presumption we would be convinced that the express preemption provisions of the Safety Act are a reliable indicium of congressional intent." *Myrick*, 13 F.3d at 1525. The Eleventh Circuit concluded that *Cipollone* negated its prior implied preemption decision in *Taylor*, that section 1397(k) barred resort to implied preemptive analysis under *Cipollone*, and that the Safety Act expressly preserves all common law claims. *Myrick*, 13 F.3d at 1522-28.

In *Freightliner*, 115 S. Ct. at 1437, this Court affirmed on alternative grounds, but issued a decision that has created great confusion as to whether implied preemption analysis is appropriate under the Safety Act. Perhaps focussing on the Eleventh Circuit's broadest summary of *Cipollone*'s impact, the Court said that the Eleventh Circuit had misread *Cipollone* to hold "that implied pre-emption cannot exist when Congress has chosen to include an express pre-emption clause in a statute" and rejected that position as "without merit." *Freightliner*, 115 S. Ct. at 1487. The Court then attempted to clarify the proper approach to preemption analysis, saying:

> The fact that an express definition of the pre-emptive reach of a statute "implies" -- i.e., supports a reasonable inference -- that Congress did not intend to pre-empt other matters does not mean that the express clause entirely forecloses any possibility of implied preemption . . . At best,

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[5] This statement tracked language in *Cipollone* itself. *See Cipollone*, 112 S. Ct. at 2625 (Blackmun J., concurring in part and dissenting in part) ("We resort to principles of implied pre-emption . . . only when Congress has been silent with respect to pre-emption"); *id.* at 2633 (Scalia, J., dissenting in part and concurring in the judgment) ("Once there is an express pre-emption provision, in other words, all doctrines of implied pre-emption are eliminated.")

> *Cipollone* supports an inference that an express preemption clause forecloses implied preemption; it does not establish a rule.

Freightliner, 115 S. Ct. at 1488.

In regard to *Cipollone*, these statements made perfect sense. The two statutes at issue in *Cipollone* contained express preemption clauses (but, unlike, the Safety Act, no express *anti-preemption* clause). The fact that Congress thought to include those express clauses in the statutes did not, without more, necessarily mean that Congress also thought of all other aspects of state law that might be preempted by the statutes -- and intended to preserve them.

In the Safety Act, however, there is more than just an express preemption clause. There is an express *anti-preemption* clause explicitly preserving all common law claims. In *Freightliner*, however, this Court did not acknowledge that fact. Instead, it simply said the Eleventh Circuit's interpretation of *Cipollone* was "without merit" and then made the statements quoted above. *Freightliner*, 115 S. Ct. at 1487-88. As a result, *Freightliner* has created extensive confusion as to whether section 1397(k) precludes a resort to implied preemption under the Safety Act.[6]

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[6] For example, after originally finding in *Hernandez-Gomez*, 884 P.2d at 191, that section 1397(k) bars resort to implied preemption analysis, the Supreme Court of Arizona said, on remand after *Freightliner*: "[A]lthough we agree that it is possible the presence of a savings clause categorically precludes preemption, the [U.S. Supreme] Court did not address the issue and we cannot tell from the language in [*Freightliner*] that it would necessarily agree with such an interpretation. It is clear to us, however, that at the very least [*Freightliner*] stands for the proposition that common-law claims that expressly and directly conflict with the text of the standard are preempted by the preemption clause; common-law claims that do not expressly conflict may still be preempted if they violate one of the articulated rules for implied preemption; common-law claims that are neither expressly nor impliedly preempted are saved. Despite the existence of the savings clause, therefore, we proceed with . . . implied

The confusion caused by the discussion of *Cipollone* in *Freightliner* was massively compounded by the preemption analysis actually employed in *Freightliner*. *Cipollone* stressed the importance of focussing on the words Congress used to determine whether express preemption exists. In *Freightliner*, however, this Court did not reach the question of whether 15 U.S.C. § 1392(d) expressly preempts common law claims or 15 U.S.C. § 1397(k) expressly preserves them. *Freightliner*, 115 S. Ct. at 1487 n.3. Instead, it rejected express preemption solely because section 1392(d), by its terms, only applies, "whenever a Federal motor vehicle safety standard is in effect" with respect to the relevant "aspect of performance" and no such Federal standard was in effect with regard to the aspect of performance (truck stopping distances) at issue in the case. *Freightliner*, 115 S. Ct. at 1147. This has prompted some courts -- including the Supreme Court of Idaho -- to hold (incorrectly) that *Freightliner* affirmatively supports a finding of express preemption whenever a Federal safety standard is in place, despite the clear words of the savings clause.

In addition, *Cipollone* stressed the importance of focussing on the words Congress used to determine whether resort to implied preemption analysis is proper, but *Freightliner* did not follow that step. Instead, without reaching respondents' arguments about the words Congress used, *id.* at 1487 n.3 (and after saying the Eleventh Circuit misinterpreted *Cipollone* as unduly barring implied preemption), the Court rejected the petitioners' preemption argument as "ultimately futile" because respondents' common law claims did not "conflict with federal law" sufficiently to warrant a finding of implied preemption. *Freightliner*, 115 S. Ct. at 1488. This has prompted some courts to hold (incorrectly) that *Freightliner* mandates resort to -- and even a finding of -- implied

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preemption analysis . . . because this case has been in our judicial system since 1990, has now been before this Court twice and before the United States Supreme Court once." *Hernandez-Gomez*, 917 P.2d at 243. *See also* footnote 7 *infra*.

preemption under the Safety Act.[7]

Thus, while *Freightliner* may have clarified the proper approach to preemption analysis in cases like *Cipollone*, where the statutes involved contain only express preemption clauses, it has created massive confusion among the lower courts about the preemptive affect of the Safety Act. Only this Court can resolve that confusion. To do so, it should grant review in this case and answer the critically-important federal question presented.

3. Whether the Safety Act Preempts Common Law Claims is An Important Question of Federal Law.

The question of federal law presented by this case is extremely important. It boils down to this: whether courts are free to disregard the argument against preemption, contravene Congress' plainly-stated intent, and exempt manufacturers from liability under state common law by judicial decree. VW and its fellow manufacturers agree that the question presented is important. One year ago, they jointly urged this Court to decide whether compliance with Standard 208 renders them immune from common

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[7] *See, e.g., Cooper v. General Motors Corp.*, 1996 WL 272362 at *15 (citing *Hill v. General Motors Corp.*, No. Civ. 94-AR-0088-S (W.D. Ala. Nov. 15, 1995)) ("While this Court is somewhat notorious for its perceived inability to predict the direction of Eleventh Circuit jurisprudence, it does know a slam dunk when it sees one. The directive from *Freightliner Corp.* is clear: 'Go back to *Taylor*.'") *See also Wilson*, 660 N.E.2d at 339 (Dickson, J., concurring) (quotations and citations deleted) ("Unlike the majority, I would not hold that the § 1397(k) preemption clause entirely forecloses any possibility of implied preemption in this case. The United States Supreme Court in *Freightliner* was faced with the same statute – with the same preemption clause and savings clause – that is before us in the present case. Rather than disposing of the issue by declaring implied preemption to be foreclosed, the *Freightliner* majority in fact performed an implied preemption analysis, concluding that compliance with both federal and state law was not impossible and that the lawsuit did not frustrate congressional objectives. That the [*Freightliner*] court expressly conducted such an analysis leads me to conclude that we must do likewise.")

law liability. *Ford Motor Company v. Tebbetts*, No. 95-709 (October Term, 1995), Brief of the American Automobile Manufacturers Association and the Association of International Automobile Manufacturers, Inc. as *Amici Curiae* Supporting the Petition. They simply maintain that the answer is "yes," even though it is "no."

Six months ago, this Court again re-emphasized that two controlling principles guide preemption analysis. First, the inquiry starts with a presumption *against* preemption, "particularly when Congress has legislated in a field which the States have traditionally occupied." *Medtronic, Inc. v. Lohr*, 116 S. Ct. 2240, 2250 (1996) ("*Medtronic*"). This approach "is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Id.* Second, "the purpose of Congress is the ultimate touchstone in every pre-emption case." *Id.* "As a result, any understanding of the scope of a pre-emption statute must rest primarily on a fair understanding of *congressional purpose*." *Id.* (emphasis in original).

Both of these principles are violated by the express preemption decision below and the decisions finding implied preemption under the Safety Act. In the decision below, the Supreme Court of Idaho failed to acknowledge -- and plainly disregarded -- the presumption against preemption. Instead, it cited the U.S. Constitution's Supremacy Clause for the proposition that "any state law which conflicts with federal law is without effect." App. 6. (quotations deleted). The implied preemption decisions do no better. Some fail to mention the presumption against preemption, others give it lip service, but the weight they give it is the same: virtually none. *See, e.g., Wilson*, 660 N.E.2d at 336 ("First and foremost, we emphasize that the *Wood* majority ignored the presumption against preemption.").

The decision below and the implied preemption decisions also contravene Congress' plain statement of intent. Congress could hardly have said it more clearly: "Compliance with *any*

Federal motor vehicle safety standard . . . shall not exempt *any* person from *any* liability under common law." 15 U.S.C. § 1397(k) (emphasis added). As the United States explained in its *amicus* brief to this Court in *Freightliner*:

> [U]nder a straightforward reading of Section 1392(d) and Section 1397(k), taken together, States are preempted from adopting prescriptive safety standards by legislative or administrative action if NHTSA has established a safety standard governing the same aspect of performance. . . State courts, however, are not precluded by those provisions from entering tort judgments in cases raising the claim that a vehicle or item of equipment was defectively designed with respect to that same aspect of performance.

Freightliner Corp. v. Myrick, No. 94-286 (October Term, 1994), Brief for United States as *Amicus Curiae* Supporting Respondents, at 16.

If the plain words of the Safety Act left any question as to Congress' intent in regard to common law claims, it would surely be answered by the statute's legislative history. The House Committee, which added section 1397(k) to the Safety Act, explained its purpose in clear and unequivocal terms:

> It is intended and this subsection specifically establishes, that *compliance with safety standards is not to be a defense or otherwise to affect the rights of parties under common law particularly* those relating to warranty, contract, and *tort liability*.

H.R. Rep. No. 1776, 89th Cong., 2d Sess. 24 (1966) (emphasis added).

Given the foregoing, the decision below is plainly in error, as are those cases resorting to implied preemption analysis. In both *Cipollone* and *Medtronic*, this Court found that Congress' enactment of express preemption provisions, standing alone, barred resort to implied preemption principles, even though the members of the Court disagreed vehemently as to the meaning of the express preemption provisions. *See Cipollone*, 112 S. Ct. at 2618; *Medtronic*, 116 S. Ct. at 2250. Here, Congress enacted both an express preemption provision and an express anti-preemption provision explicitly preserving the aspect of state law at issue. To allow implied preemption under these circumstances would render the limitations imposed on implied preemption in *Cipollone* and *Medtronic* meaningless -- and make implied preemption analysis a tool for wholesale judicial activism and the widespread evasion of Congress' intent.

Moreover, even if implied preemption could properly be considered under the Safety Act, claims like plaintiffs' still would not be preempted. There simply is no conflict between plaintiffs' claims and Standard 208. It is true that Standard 208 required all 1987 model-year cars to have, at a minimum, either (1) a manual lap belt and shoulder harness, (2) an automatic belt system providing at least a specified level of protection in head-on crashes, or (3) an airbag or other device providing automatic protection in head-on and angular crashes. It is equally true that VW, which chose the second option, could have installed a lap belt (or for that matter, an airbag) in Ms. Zimmerman's 1987 Volkswagen Golf *in addition to* the automatic shoulder harness and knee bolster it installed, and still have complied with that option under Standard 208. And it is obvious that, if VW had taken that step, Dorothy Zimmerman's 1987 Volkswagen Golf would have been safer. If, by failing to install a lap belt, VW violated Idaho common law and caused Dorothy Zimmerman's death, Congress did not intend to exempt VW from liability. Section 1397(k) makes that fact plain.

This Court has repeatedly refused to find that Congress intended to deprive tort victims of common law remedies, even

when Congress has not expressly preserved common law claims, saying "it is difficult to believe that Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct." *Medtronic*, 116 S. Ct. at 2251 (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)). In this case, Congress *did* comment and it expressly *preserved* all common law claims. This Court should grant review to ensure that Congress' intent is respected and that the Zimmermans -- and thousands of similarly situated Americans -- are not illegally denied their day in court.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT OF THE STATE OF IDAHO
Docket No. 20993

BRIAN R. ZIMMERMAN, THERESA TARP ZIMMERMAN, PAUL TARP and MELBA STOPELLO,	) 1996 Opinion No. 56
Plaintiffs-Appellants,	) Boise, March 1996 Term
v.	) Filed: May 24, 1996
VOLKSWAGEN OF AMERICA, INC., and VOLKSWAGEN AKTIENGESELLSCHAFT,	) Frederick C. Lyon, Clerk
Defendants-Respondents.	

Appeal from the District Court of the Fourth Judicial District of the State of Idaho, Ada County. Hon. D. Duff McKee, District Judge.

Appeal from the district court's order granting a motion to dismiss claim for hedonic damages and a motion for summary judgment. Order granting summary judgment: Affirmed.

Martin, Chapman, Schild & Lassaw, Boise; John G. Phillip & Assoc., Chicago, Illinois for appellants. John F. Klebba argued.

Evans Keane, Boise for respondents. Bruce C. Jones argued.

TROUT, Justice.

This is a products liability action brought against Volkswagen of America, Inc., and Volkswagem Aktiengesellschaft (Volkswagen) by the family of Dorothy Zimmerman (the Zimmermans) alleging that the restraint system used in Dorothy Zimmerman's (Dorothy) vehicle was defective and a substantial factor in causing her death.

I.

BACKGROUND

On March 24, 1989, Dorothy was driving her 1987 Volkswagen Golf east on Franklin Road. While in the process of making a left turn onto Ten Mile Road, Dorothy was struck by a pickup truck which was traveling westbound on Franklin Road. After the collision Dorothy was alert and oriented but complained of left knee pain to the emergency medical technician responding to the accident. Dorothy was then transported by ambulance to St. Alphonsus Hospital where she spoke with Dr. Austin Cushman. Dorothy told Dr. Cushman that she did not recall striking anything within the automobile during the accident and thought that she was relatively uninjured although she did note some pain above her waist on the right side. Shortly after speaking with Dr. Cushman, Dorothy became unresponsive and later died from what Dr. Cushman concluded was an internal hemorrhage caused by a liver laceration. In Dr. Cushman's opinion, Dorothy's liver was torn from the inside outward when the restraint system in Dorothy's car caused her body to rapidly decelerate immediately after the collision and the entire force of that deceleration was imparted to her abdomen by the seat belt.

The Zimmermans' complaint alleged causes of action against Volkswagen for strict products liability, negligence, and breach of warranty and included a claim for hedonic damages. The district court dismissed the Zimmermans' claim for hedonic

damages pursuant to Volkswagen's motion and the breach of warranty claim was dismissed by stipulation. The court subsequently granted Volkswagen's motion for summary judgment finding that the Zimmermans' claims against Volkswagen were both expressly and impliedly preempted by applicable provisions of the National Traffic and Motor Vehicle Safety Act, 49 U.S.C. §§ 30101-169 (formerly codified at §§ 1381-1431 (1982)) (Safety Act). The district court also ordered that Volkswagen be awarded certain of its costs pursuant to I.R.C.P. 54(d)(1).

II.

STANDARD OF REVIEW

A motion for summary judgment must be granted by a district court if "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." I.R.C.P. 56(c). A review by this Court of a district court's ruling on a motion for summary judgment is the same as that required of the district court when it rules on the motion. *Curtis v. Firth*, 123 Idaho 598, 610, 850 P.2d 749, 761 (1993). The Court liberally construes the record in the light most favorable to the party opposing the motion, drawing all inferences and conclusions in that party's favor, and if reasonable people could reach different conclusions or draw conflicting inferences then an order granting summary judgment must be reversed. *Friel v. Boise City Hous. Auth.*, 126 Idaho 484, 485, 887 P.2d 29, 30 (1994).

If the defendant moves for summary judgment on the basis that no genuine issue of material fact exists with regard to an element of the plaintiff's case, the plaintiff must establish the existence of an issue of fact regarding that element. *Farm Credit Bank of Spokane v. Stevenson*, 125 Idaho 270, 272-73, 869 P.2d 1365, 1367-68 (1994). In order to forestall summary judgment in that case, the plaintiff must do more than present a scintilla of

evidence, and merely raising the "slightest doubt" as to the facts is not sufficient to create a genuine issue. *Petricevich v. Salmon River Canal Co.*, 92 Idaho 865, 871, 452 P.2d 362, 368 (1969); *G & M Farms v. Funk Irrigation Co.*, 119 Idaho 514, 517, 808 P.2d 851, 854 (1991).

III.

PREEMPTION

The manufacturer of a motor vehicle is under a duty to design and manufacture its products so as to eliminate unreasonable risks of foreseeable injuries that may occur if the vehicle is involved in a collision or other impact. *Farmer v. International Harvester Co.*, 97 Idaho 742, 751, 553 P.2d 1306, 1315 (1976). Strict liability in tort is imposed on the manufacturer for its failure to produce a crashworthy vehicle. *Shields v. Morton Chem. Co.*, 95 Idaho 574, 676-77, 518 P.2d 857, 859-60 (1974) (quoting The Restatement of the Law, Torts 2d, § 402A (1965)). In "second collision" cases the injured occupant of the automobile bears the burden of presenting sufficient evidence for the trier of fact to reasonably find that the vehicle was defective and that the defect enhanced or intensified the injuries sustained in the accident. *Johnson v. Pischke*, 108 Idaho 397, 403, 700 P.2d 19, 25 (1985); *Curtis v. DeAtley*, 104 Idaho 787, 790, 663 P.2d 1089, 1092 (1983) (citing *Rindlisbaker v. Wilson*, 95 Idaho 752, 519 P.2d 421 (1974)); *Fouche v. Chrysler Motors Corp.*, 103 Idaho 249, 253-54, 646 P.2d 1020, 1024-25 (Ct. App. 1982).

The restraint system used in Dorothy's Golf, identified by its acronym VWRA, is a "passive" system requiring no action on the part of the occupant to actuate it. The VWRA system consists, for the most part, of a shoulder belt which is anchored to the seat on the inboard side and to the door on the outboard side and includes a padded knee bar under the dash and a specially designed seat to minimize submarining. There is no lap belt and, when the door closes, the shoulder belt is automatically positioned across the

occupant's chest.

The VWRA system was designed to comply with Federal Motor Vehicle Safety Standard 208 (FMVSS 208), 49 C.F.R. § 571.208 (1986), a regulation promulgated by the National Highway Traffic Safety Administration (NHTSA), an agency within the Department of Transportation, under the auspices of the Safety Act. This regulation specified motor vehicle performance requirements for the protection of vehicle occupants in crashes and allowed car manufacturers the choice of selecting one of three options for satisfying the federal performance standards, *i.e.*, either complete passive protection, passive restraints, or lap and shoulder belt protection systems with belt warnings. 49 C.F.R. § 571.208. The VWRA was designed to comply with the second option and was intended to function so that in a collision the driver's knees would contact the padded knee bar under the dash to limit motion of the lower portion of the driver's body, and the shoulder belt would prevent the driver's head from hitting the windshield. In their complaint, the Zimmermans do not allege that the VWRA failed to operate as it was designed to during the accident and they concede that the VWRA fully complied with the performance standards set forth in FMVSS 208. The only defect in the VWRA the Zimmermans could definitively point to was Volkswagen's failure to also include a lap belt.

In determining whether Volkswagen can be held liable for not including a lap belt in Dorothy's Golf, a threshold issue is whether that particular claim is preempted by the Safety Act. The Safety Act provides that the NHTSA shall promulgate safety standards that manufacturers are required to incorporate into their products. 15 U.S.C. § 1392(a). Section 1392 also mandates uniformity in the development of safety standards through the Safety Act's express exemption provision:

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State

> shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

15 U.S.C. § 1392(d).

FMVSS 208, as it read when Dorothy's Golf was manufactured, required that all passenger cars possess one of three types of crash protection: (1) complete passive protection for all crashes; (2) passive restraints for head-on collisions; or (3) manual three-point seat belts with belt warnings. 49 C.F.R. § 571.208, S4.1.2.1-3. FMVSS 208 also provided that a manufacturer could install an automatic belt "that requires no action by vehicle occupants . . . to meet the crash protection of any option under S4 and in place of any seat belt assembly otherwise required by that option." 49 C.F.R. § 571.208, S4.5.3.

It is well settled that any state law which conflicts with federal law is "without effect" as provided under the Supremacy Clause of the United States Constitution.[1] *Cipollone v. Liggett Group, Inc.* 112 S. Ct. 2608, 2617 (1992) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 2128, 68 L. Ed. 2d 576 (1981) and citing *M'Culloch v. Maryland*, 17 U.S. (4 Wheat) 316, 427, 4 L. Ed. 579 (1819)). In some cases, state law is expressly preempted by the language of a federal statute. *Id.*

As the Zimmermans have conceded, the VWRA fully

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[1]"This Constitution, and the laws of the United States which shall be made in pursuance thereof . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2.

complied with the performance requirements of FMVSS 208. The issue then is whether Volkswagen can be held liable for selecting one of the options clearly available to it under the regulations promulgated by the NHTSA which do not require a lap belt. The Zimmermans contend that their claims are not expressly preempted because section 1392(d), by its terms, only preempts positive enactments by a "State or political subdivision of a State" and not common law claims. As the United States Supreme Court in *Cipollone* noted, however, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief." *Id.* at 2620 (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959)). More specifically, the Supreme Court has discussed the preemptive effect of section 1392(d) of the Safety Act on state common law claims. *Freightliner v. Myrick*, 115 S. Ct. 1483, 1487 (1995). In *Freightliner*, the Court refused to expressly preempt tort causes of action brought against various manufacturers of trucks and trailers for their failure to equip these vehicles with anti-lock brakes. The Court noted that where there was "no express federal standard addressing" a particular aspect of performance then a state law claim may proceed. 115 S. Ct. at 1487. Implicit in the Court's rejection of express preemption in *Freightliner* is its recognition of the preemptive effect of section 1392(d) in those cases where a standard specifically addresses the aspect of performance in question. In this action there exists a federal standard that directly addresses the performance requirements of automobile restraint systems to protect vehicle occupants during crashes. Hence we find the distinction advocated by the Zimmermans to be nonpersuasive and we hold, instead, that the claims against Volkswagen for failure to include a lap belt with the VWRA are preempted by the express provisions of the Safety Act. *See also Boyle v. Chrysler Corp.*, 501 N.W. 2d 865, 869 (Wis. App. 1993) ("[The Safety Act] explicitly preempts any state motor vehicle safety standards, including those established through the imposition of common-law liability, that are in conflict with the federal standards."); *Vanover v. Ford Motor Co.*, 632 F. Supp. 1095, 1096 (E.D. Mo. 1986) (section 1392(d) expressly preempts state tort

law).

Because we find the Zimmermans' claims to be expressly preempted by the Safety Act, we do not address Volkswagen's contention that these claims are impliedly preempted as well.

The Zimmermans maintain, however, that Congress specifically intended that their claims should survive by including within the Safety Act a section which provides:

> Compliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.

15 U.S.C. § 1397(c). General savings clauses cannot be read, however, to permit common law actions that undermine federal policy. *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992). Savings clauses of this type are designed not to preserve common law claims that conflict with federal law but only to preserve state law causes of action that do not disrupt the federal statutory scheme. *Kalo Brick*, 450 U.S. at 328. In this case, the Zimmermans' claims are expressly preempted by the Safety Act and cannot be preserved by the Act's general savings clause.

The Zimmermans argue that notwithstanding the preemptive effect of the Safety Act and failure of the savings clause to preserve their claims, their action against Volkswagen should be allowed to proceed. They maintain before this Court that the design of the VWRA is defective not only because it failed to provide an active lap belt but also because its effectiveness is dependent upon the size of the occupant and the direction of the impact. Thus they now argue that the design defect in the passive restraint system consist of more than simply Volkswagen's failure to select a different option under FMVSS 208. It is debatable whether this argument was actually made to the district court, but more importantly, the basis for this claim is not supported by the

evidence presented to the district court. One of the Zimmermans' experts, Ted Mitchell, opined early in his deposition that the VWRA was defective in design because it could have used an active lap belt system. Mitchell also criticized the VWRA's design as dependent upon the size of the occupant and the direction of the impact without providing the occupant with sufficient warning. He later backed away from this particular position, however, noting:

> in my opinion the system is very dependent upon size, and anything varying from that ideal situation makes it more likely to cause injury, but I don't know whether that crosses the line of defective or not, and that would be based upon what Dr. Ward's opinion is.

Dr. Ward noted in her deposition that indeed, the VWRA was dependent upon the occupant's size and the direction of impact but she never asserted that it was defective for those particular reasons stating only "that the [VWRA] system was defective because of the absence of even an active lap belt."

It thus appears that although both experts were in agreement that the VWRA was defective for not including a lap belt, neither expert posited an opinion that the system was defective for any other reason. Thus, although there is certainly substantial evidence to show that the VWRA was the actual cause of Dorothy's injuries, that fact alone does not automatically indicate liability on Volkswagen's part.

> [S]trict liability is not absolute liability because a manufacturer is not an insurer or guarantor that no one will be injured in using his product. The manufacturer is under a duty to produce a product which is free from unreasonable dangerous conditions.

Sun Valley Airlines, Inc. v. Avco-Lycoming Corp., 411 F. Supp.

598, 602 (D. Idaho 1976). Even in strict liability cases, then, the plaintiff must first proffer evidence of a defect in a product before liability against the manufacturer can be found and the only defect in the VWRA that the Zimmermans' experts can point to is the system's failure to include a lap belt. As we have discussed above, however, this claim is expressly preempted by the provisions of the Safety Act and, for that reason, the district court's grant of Volkswagen's motion for summary judgment is affirmed.

IV.

ASSESSMENT OF COSTS

The Zimmermans contend that the district court erred in assessing against them certain of Volkswagen's costs, arguing that the defendant is not entitled to costs under I.R.C.P. 68 or 54(d)(1)(D) and that even costs recoverable as of right under I.R.C.P. 54(d)(1)(C) should be disallowed. Because the district court expressly declined to award Volkswagen its costs under I.R.C.P. 68, we address only the award of costs to Volkswagen under the provisions of I.R.C.P. 54(d)(1).

An award of costs under I.R.C.P. 54(d)(1), as the rule itself provides, is committed to the sound discretion of the district court. *See Durrant v. Christensen*, 117 Idaho 70, 72, 785 P.2d 634, 636 (1990) (citing *Gilbert v. City of Caldwell*, 112 Idaho 386, 732 P.2d 355 (Ct. App. 1987)). The burden is on the party opposing the award to demonstrate an abuse of the district court's discretion and, "absent an abuse of discretion, the district court's award of costs will be upheld." *Id.* (citing *Anderson v. Ethington*, 103 Idaho 658, 651 P.2d 923 (1982); *Martsch v. Nelson*, 109 Idaho 95, 705 P.2d 1050 (Ct. App. 1985)).

When an appellate court reviews the district court's exercise of discretion, the appellate court should determine: (1) whether the trial court correctly perceived the issue as discretionary; (2)

whether the trial court acted within the boundaries of its discretion and consistent with the applicable legal standards; and (3) whether the trial court reached its determination through an exercise of reason. *State v. Hedger*, 115 Idaho 598, 600, 768 P.2d 1331, 1333 (1989) (quoting *Associates Northwest, Inc. v. Beets*, 112 Idaho 603, 605, 733 P.2d 824, 826 (Ct. App. 1987)). At oral argument the trial court reviewed the subsections of I.R.C.P. 54(d)(1) and accurately perceived that the assessment of costs awarded to the prevailing party under both subsections (C) and (D) of Rule 54(d)(1) is discretionary with the court. In determining that costs should be assessed under each subsection, the district court also correctly operated within the boundaries of its discretion as defined within the rule.

The Zimmermans contend, however, that the district court erred in awarding costs to Volkswagen as a matter of right under subsection (C), arguing that these costs were unreasonably incurred and could have been avoided if Volkswagen had brought its motion for summary judgment at an earlier time and before it incurred most of the claimed expenses. Volkswagen should not be penalized, however, for making a tactical decision in determining when a motion for summary judgment should best be filed within the time frame allowed for bringing such a motion. In addition, the depositions Volkswagen obtained prior to bringing its motion certainly clarified upon what theory the Zimmermans' claims were based and substantially narrowed the issues for resolution. More importantly, however, Volkswagen obviously could not have known that its motion for summary judgment, whenever the motion was filed, would be granted, and its decision to prepare for an eventual trial if its motion were denied could not be considered unreasonable.

In determining whether the district court reached its conclusion to award costs through an exercise of reason it is inappropriate for us, just as it was for the district court, to utilize hindsight analysis against the prevailing party. Although Volkswagen prevailed in its motion for summary judgment, it could

not have known that fact early in this action and thereby avoided all costs not absolutely necessary to the motion. We find, therefore, that the district court's award of Volkswagen's costs as a matter of right under I.R.C.P. 54(d)(1)(C) was determined through an act of reason and we affirm that order.

With regard to the discretionary fees under subsection (D), the district court awarded Volkswagen an amount equal to one-third of the fees charged by the expert witnesses secured by Volkswagen that exceeded the $500 per day allowable under subsection (C). The district court found that only this portion of the expert witness fees was necessary, exceptional, and reasonable. The court also awarded Volkswagen the vehicle storage fees it incurred as well as nominal videography fees. The award of these discretionary costs to Volkswagen under I.R.C.P. 54(d)(1)(D) appears also to have been reached through an exercise of reason and is similarly affirmed.

V.

CONCLUSION

For the reasons stated above, we affirm the district court's order granting Volkswagen's motion for summary judgment. Since we have affirmed summary judgment in favor of Volkswagen, it is unnecessary for us to address the Zimmermans' other issue relating to their requested award of hedonic damages. Finally, we affirm the district court's award of certain of Volkswagen's costs in litigating this case.

Chief Justice McDEVITT, Justices SILAK and SCHROEDER and Justice Pro Tem SCHILLING, concur.

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IN THE DISTRICT COURT OF THE
FOURTH JUDICIAL DISTRICT OF THE
STATE OF IDAHO, IN AND FOR THE COUNTY OF ADA

BRIAN R. ZIMMERMAN, THERESA TARP ZIMMERMAN, PAUL TARP and MELBA STOPELLO,	)	
Plaintiffs,	)	Case No. 94139
v.	)	
JOSEPH RICHARD JONES, PETE COPE DRILLING, INC. VOLKSWAGEN OF AMERICA, INC., VOLKSWAGEN AKTIENGESELLSCHAFT, and TREASURE VALLEY VOLKSWAGEN, INC., an Idaho corporation,	)	ORDER AND SUMMARY JUDGMENT
Defendants.	)	

Defendants Volkswagen of America, Inc.'s and Volkswagen A.G.'s Motion for Summary Judgment Based on Federal Preemption having come on regularly for hearing on the 7th day of September, 1993, and the plaintiffs being represented by their counsel of record, John F. Klebba of JOHN G. PHILLIPS & ASSOCIATES and Raymond D. Schild of MARTIN CHAPMAN SCHILD & LASSAW, and defendants being represented by their attorneys of record, Bruce C. Jones and David W. Gratton of EVANS, KEANE, and the Court having considered the memoranda and affidavits filed herein, having heard oral argument, and there appearing to be no material issues of fact, and the Court being fully advised in the premises;

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, consistent with the comments of the Court at oral argument:

1. Plaintiffs have asserted common law tort claims against defendants alleging that a 1987 Volkswagen Golf vehicle, equipped with passive safety belt restrains expressly authorized by Federal Motor Vehicle Safety Standard 208 as a restraint option, is defective for failing to be provided with an active lap belt or active lap/shoulder belt restraint. 15 U.S.C. § 1392(d) prohibits the enforcement of any state standard that differs from an applicable Federal Safety Standard. Because plaintiffs' claims would impose a state law requirement that differs from the explicit passive restraint option granted by the National Traffic Motor Vehicle Safety Act, 15 U.S.C. §§ 1381 et seq. ("Safety Act") and its regulations, those claims are expressly preempted.

2. Federal preemption of state tort claims can also occur when the state law sought to be imposed conflicts with a federal statute or regulation and stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

The said plaintiffs' claims would frustrate the federal policies and purposes of the Safety Act, Safety Standard 208 and the federal regulatory scheme by upsetting the careful balancing of safety considerations on which the Secretary of Transportation's deeision to grant passive restraint options rested. Accordingly, those claims are impliedly preempted by the conflict with applicable federal statutes, regulations, policies and purposes.

3. Therefore defendants' motion for summary judgment is granted in its entirety and judgment is entered in favor of defendants Volkswagen of American, Inc. and Volkswagen A.G., Inc. against plaintiffs;

4. The Court will address the matter of costs to the prevailing party by separate order following proper submission pursuant to the Idaho Rules of Civil Procedure.

Dated this 20th day of October, 1993.

Honorable D. Duff McKee
District Judge

In the Supreme Court of the State of Idaho

BRIAN R. ZIMMERMAN, THERESA TARP ZIMMERMAN, PAUL TARP and MELBA STOPELLO,	)
Plaintiffs-Appellants,	) ORDER DENYING) PETITION FOR) REHEARING
v.	)
	) NO. 20993
VOLKSWAGEN OF AMERICA, INC., and VOLKSWAGEN AKTIENGESELLSCHAFT,	) Reh. No. 96HR-15
Defendants-Respondents.	)

The Appellants having filed a PETITION FOR REHEARING on June 14, 1996, and supporting MEMORANDUM on June 27, 1996, of the Court's Opinion released May 24, 1996; therefore, after due consideration,

IT IS HEREBY ORDERED that Appellants' PETITION FOR REHEARING be, and hereby is, DENIED.

DATED this 8th day of August, 1996.

By Order of the Supreme Court

Frederick C. Lyon, Clerk

cc: Counsel of Record
District Court Clerk
District Judge D. Duff McKee

(2)

No. 96-904

FILED

FEB 6 1997

CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1996

BRIAN R. ZIMMERMAN, THERESA TARP ZIMMERMAN, PAUL TARP, AND MELBA STOPELLO, PETITIONERS

v.

VOLKSWAGEN OF AMERICA, INC., AND VOLKSWAGEN AKTIENGESELLSCHAFT, RESPONDENTS

On Petition for a Writ of Certiorari to the Supreme Court of Idaho

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QUESTION PRESENTED

Whether the Supreme Court of Idaho correctly concluded that petitioners' tort claim, which alleged that respondents' 1987-model automobile was defectively designed because it was equipped with a "passive" occupant restraint system that did not include a "manual" lap belt, was expressly preempted by the National Traffic and Motor Vehicle Safety Act because the claim conflicted with Federal Motor Vehicle Safety Standard 208.

RULE 29.6 STATEMENT

Respondent Volkswagen AG (sued as Volkswagen Aktiengesellschaft (VWAG)), a corporation organized and existing under the laws of the Federal Republic of Germany, has issued shares that are traded on a public foreign exchange. Respondent Volkswagen of America, Inc., is a wholly owned subsidiary of VWAG and has issued no publicly traded shares. Other major subsidiaries and affiliates of VWAG in which it has a substantial interest include:

AUDI AG
AutoEuropa Automoveis Lda.
AUTOGERMA S.p.A.
Chinchun Motor Co., Ltd.
Coordination Center Volkswagen S.A.
Dead Sea Magnesium Ltd.
Europcar International S.A.
FAW-Volkswagen Automotive Company, Ltd.
FINGERMA S.p.A.
Groupe VOLKSWAGEN France s.a.
Seat Deutschland GmbH
SEAT, S.A.
Shanghai-Volkswagen Automotive Company Ltd.
SKODA Automobile Deutschland GmbH
SKODA, autmobilova a.s.
SkoFIN s.r.o.
Svenska VOLKSWAGEN AB
Volkswagen Argentina S.A.
Volkswagen Asia-Pacific Ltd.
Volkswagen Bank GmbH
Volkswagen Bruxelles S.A.
Volkswagen Canada, Inc.
Volkswagen Comercio e Participacoes Ltda.
Volkswagen de Mexico, S.A. de C.V.
Volkswagen do Brasil Ltda.
Volkswagen Finance Japan K.K.

VOLKSWAGEN FINANCE S.A.
VOLKSWAGEN FINANCE, S.A.
Volkswagen Financial Services (UK) Ltd.
Volkswagen Financial Services AG
Volkswagen Financial Services N.V.
Volkswagen Financial Services, S.A. de C.V.
VOLKSWAGEN Group Japan K.K.
VOLKSWAGEN Group United Kingdom Ltd.
Volkswagen International Finance N.V.
Volkswagen Investments Ltd.
Volkswagen Leasing GmbH
Volkswagen Navarra, S.A.
Volkswagen of South Africa (Pty.) Ltd.
Volkswagen Poznan Sp. z.o.o.
VOLKSWAGEN Synko GmbH
Volkswagen Transport GmbH & C.OHG
VOTEX GmbH
VW Credit, Inc.
VW-Gesellschaft fur technische
Datenverarbeitungssysteme mbH

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 STATEMENT	ii
TABLE OF AUTHORITIES	v
STATEMENT	2
A. The Safety Act And FMVSS 208	2
B. Factual And Procedural Background	8
C. The Idaho Supreme Court's Decision	9
REASONS FOR DENYING THE PETITION	10
A. There Is No Conflict In The Lower Courts Over The Question Whether FMVSS 208 Preempts "No Lap Belt" Claims	10
B. The Narrow Decision In This Case On Express Preemption Of "No Lap Belt" Claims Does Not Merit Review By This Court	14
C. Petitioners' Tort Claims Are Expressly Preempted	19
D. Petitioners Offer No Reason To Distinguish This Case From The Many Other Safety Act Preemption Cases In Which The Court Has Recently Denied Certiorari	26
CONCLUSION	28

TABLE OF AUTHORITIES

Cases: **Page(s)**

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Chicago & N.W. Transp. Co. v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981) 19-20, 24

Chisom v. *Roemer*, 501 U.S. 380 (1991) 23

Cipollone v. *Liggett Group, Inc.*, 505 U.S. 504 (1992) 19-22

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TABLE OF AUTHORITIES — Continued

Page(s)

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English v. *General Elec. Co.*, 496 U.S. 72 (1990) 26

Fidelity Fed. Sav. & Loan Ass'n v. *de la Cuesta*, 458 U.S. 141 (1982) 27

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Fox v. *Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978) 13

Freightliner Corp. v. *Myrick*, 115 S. Ct. 1480 (1995) 16, 21, 28

Grenier v. *Vermont Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996) 20

Hernandez-Gomez v. *Leonardo*, 917 P.2d 238 (Ariz. 1996) 11-12

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TABLE OF AUTHORITIES — Continued

Page(s)

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Ketchum v. *Hyundai Motor Co.*, 57 Cal. Rptr.2d 595 (Cal. App. 1996) 11

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Knippen v. *Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976) 13

Lynnbrook Farms v. *SmithKline Beecham Corp.*, 79 F.3d 620 (7th Cir.), cert. denied, 117 S. Ct. 178 (1996) 20

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TABLE OF AUTHORITIES — Continued

Page(s)

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Motor Vehicle Mfrs. Ass'n v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) 3-4

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O'Bryan v. *Volkswagen of America, Inc.*, 838 F. Supp. 319 (W.D. Ky. 1992) 9

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Pacific Legal Found. v. *DOT*, 593 F.2d 1338 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979) 4

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Pennsylvania R.R. v. *Puritan Coal Mining Co.*, 237 U.S. 121 (1915) 24

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Page(s)

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Schwartz v. *American Honda Motor Co.*, 710 F.2d 378 (7th Cir. 1983) 13

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Shipp v. *General Motors Corp.*, 750 F.2d 418 (5th Cir. 1985) 13

Sours v. *General Motors Corp.*, 717 F.2d 1511 (6th Cir. 1983) 13-14

Stamps v. *Collagen Corp.*, 984 F.2d 1416 (5th Cir.), cert. denied, 510 U.S. 824 (1993) 20

State Farm Mutual Auto. Ins. Co. v. *Dole*, 802 F.2d 474 (D.C. Cir. 1986), cert. denied, 480 U.S. 951 (1987) 4-6, 16

Stonehocker v. *General Motors Corp.*, 587 F.2d 151 (4th Cir. 1978) 13

Taylor v. *General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990) 15, 26

TABLE OF AUTHORITIES — Continued

Page(s)

Texas & Pac. Ry. v. *Abilene Cotton Oil Co.*, 204 U.S. 426 (1907) 24-25

United States v. *Williams*, 504 U.S. 36 (1992) 17

Welsh v. *Century Prods.*, 745 F. Supp. 313 (D. Md. 1990) 17

Wickstrom v. *Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. App. 1987), cert. denied, 487 U.S. 1236 (1990) 26

Wilson v. *Pleasant*, 660 N.E.2d 327 (Ind. 1995) 15

Wood v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1989) 2, 15, 26

Statutes, regulations, and rules:

7 U.S.C. §§ 136, *et seq.* 20

15 U.S.C. §§ 1381, *et seq.* 1

15 U.S.C. § 1391(1) 2

15 U.S.C. § 1392(a) 2

15 U.S.C. § 1392(d) . . . . . *passim*

15 U.S.C. § 1392(f)(3) 2

15 U.S.C. § 1397(k) . . . . . *passim*

15 U.S.C. §§ 1261, *et seq.* 21

46 U.S.C. §§ 4301, *et seq.* 21

TABLE OF AUTHORITIES — Continued

Page(s)

49 U.S.C. §§ 30101, *et seq.* 1

49 U.S.C. § 30103 22

49 U.S.C. § 30103(b) 22

49 U.S.C. § 30103(e) 22

Pub. L. No. 103-272, § 1(e), 108 Stat. 943 22

Pub. L. No. 102-240, § 2508(d), 105 Stat. 2086 6

49 C.F.R. § 571.208 . . . . . *passim*

S. Ct. Rule 14.1(a) 17

Miscellaneous:

H.R. Rep. No. 89-1776 (1991) 3, 23

H.R. Rep. Conf. No. 89-1919 (1966), *reprinted in* 1966 U.S.C.A.A.N. 2731 23

S. Rep. No. 89-1301 (1966), *reprinted in* 1966 U.S.C.A.A.N. 2709 3

112 Cong. Rec. 14253 (1966) 3

32 Fed. Reg. 2415 (1967) 3

39 Fed. Reg. 3834 (1974) 8-9

41 Fed. Reg. 24070 (1976) 9

41 Fed. Reg. 24072 (1976) 9

42 Fed. Reg. 34289 (1977) 9

TABLE OF AUTHORITIES — Continued

Page(s)

49 Fed. Reg. 28962 (1984) 4-5, 9

62 Fed. Reg. 798 (1997) 6

Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE (7th ed. 1993) 17

BRIEF FOR THE RESPONDENTS IN OPPOSITION

Petitioners seek review of a single, factbound question (Pet. i, 7): whether the National Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381-1431 (recodified at 49 U.S.C. §§ 30101-30169) (Safety Act or Act),[1] expressly preempts a state common-law tort claim that an automobile was defectively designed because its fully "passive" occupant restraint system, which complied with all federal safety requirements, did not have a "manual" lap belt. The Supreme Court of Idaho held that petitioners' tort claim was expressly preempted by the Safety Act, because it conflicted with Federal Motor Vehicle Safety Standard (FMVSS) 208, 49 C.F.R. § 571.208.

As petitioners explain (see Pet. 7-16), the lower courts over the past decade have decided a large number of preemption disputes arising from challenges to the use of passive restraint systems. Virtually all of these cases, however, have involved the question whether the claim that an automobile was defective because it lacked an *airbag* was *impliedly* preempted by FMVSS 208. The decision below, by contrast, is limited (i) to the factually distinct (and uncommon) claim that an automobile should have had a *manual lap belt* in addition to a "passive" seat belt system; and (ii) to the legal issue of *express* preemption under the Safety Act. Thus, even if this Court were inclined to enter the debate over the preemptive effect of FMVSS 208 — and it has denied review of such decisions on ten different occasions, including as recently as last Term — this would be a most atypical and inappropriate case.

In any event, review of the decision below is clearly not warranted because there is no conflict in the lower courts on the precise legal issue presented by the facts of this case.

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[1] For ease of reference we refer to the prior codification of the Safety Act, which is cited in the petition (Pet. 7) and in the opinions of the courts below (Pet. App. 3, 5, 14).

Moreover, the express preemption ruling of the Idaho Supreme Court is fully consistent with prior decisions of this Court.

STATEMENT

A. The Safety Act And FMVSS 208

1. Congress enacted the Safety Act in 1966 to protect the public against the "unreasonable risk of accidents occurring as a result of the design, construction or performance of motor vehicles and against [the] unreasonable risk of death or injury to persons in the event accidents do occur." 15 U.S.C. § 1391(1). It sought to accomplish this goal by authorizing the Secretary of Transportation to prescribe safety standards of nationwide applicability. Congress declared that such standards must "meet the need for motor vehicle safety" and be "reasonable" and "practicable" in their operation. 15 U.S.C. §§ 1392(a), 1392(f)(3).

Congress intended the safety standards promulgated under the Act to be "uniform national standards," *Wood* v. *General Motors Corp.*, 865 F.2d 395, 412 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1989), and achieved that objective by preempting state law in the following express terms (15 U.S.C. § 1392(d)):

> Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard.

Another provision of the Act added a so-called "savings" clause, which provides that compliance with federal standards does not necessarily "exempt any person from any liability under common law." 15 U.S.C. § 1397(k).

Explaining the need to preempt state law, the Senate Report on the Act emphasized that "State standards are preempted" to the extent "they differ from Federal standards" because "the primary responsibility for regulating the national automotive manufacturing industry must fall squarely upon the Federal Government." S. Rep. No. 89-1301, at 4 (1966), *reprinted in* 1966 U.S.C.A.A.N. 2709, 2712. The House Report noted that "this preemption subsection is intended to result in uniformity of standards so that the public as well as industry will be guided by one set of criteria rather than by a multiplicity of diverse standards." H.R. Rep. No. 89-1776, at 17 (1991). As President Johnson observed: "The only alternative is unthinkable — 50 standards for 50 different States. I believe that this would be chaotic." 112 Cong. Rec. 14253 (1966).

2. In exercising the Secretary of Transportation's authority under the Safety Act, the National Highway Traffic Safety Administration (NHTSA) has promulgated numerous standards on motor vehicle design and performance. At issue in this case is FMVSS 208, the occupant restraint standard, which addresses the "requirements for the protection of vehicle occupants in crashes" (49 C.F.R. § 571.208, S1). FMVSS 208 was promulgated by NHTSA in 1967 to require manual seat belts in all new automobiles. 32 Fed. Reg. 2415 (1967).

Because automobile users often failed to buckle their manual seat belts, however, NHTSA soon began to consider the feasibility of "passive" restraint systems, including automatic seat belts and airbags.[2] The decision whether and when to require the installation of such passive restraints has been the subject of extensive study, controversy, and modifi-

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[2] "Passive" restraints are "devices that do not depend for their effectiveness upon any action taken by the occupant except that necessary to operate the vehicle." *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 34-35 (1983).

cations over the last three decades by NHTSA, Congress, and the courts. See *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *State Farm Mut. Auto. Ins. Co.* v. *Dole*, 802 F.2d 474 (D.C. Cir. 1986), cert. denied, 480 U.S. 951 (1987).[3] Most of the debate, analysis and litigation in the years since the adoption of FMVSS 208 — which culminated in a significant amendment of the Standard in 1984 by Secretary of Transportation Elizabeth Dole — has concerned the safety, utility, and public acceptability of airbags. See *Motor Vehicle Mfrs.*, 463 U.S. at 34-38, 46-51; *State Farm*, 802 F.2d at 477-478, 487-489.

As amended in 1984, FMVSS 208 called for the gradual "phase-in" of passive restraint systems (either airbags or automatic seat belts) in automobiles over a four-year period beginning with the 1987 model year: 10% of automobiles manufactured between September 1, 1986, and August 31, 1987, were required to have passive restraints. 49 C.F.R. § 571.208 S4.1.3.1.2; 49 Fed. Reg. 28962, 28999-29000 (1984). Secretary Dole explained that the phase-in was necessary because of "the need for the public to become accustomed to the technology and the need for protection, and [because] an across-the-board mandate too quickly could engender adverse public reaction." *Id.* at 28989.

The Secretary's amendment of FMVSS 208 was premised on numerous safety concerns, including doubts about the efficacy of airbags (particularly in smaller cars in which the minimal space between the front of the car and the passenger leaves little time for the bag to inflate, 49 Fed. Reg. at 28974, 29001) and apprehension that the high cost of airbags would lead owners not to replace them after deployment, with

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[3] For example, between 1969 and 1976, the federal government conducted over 2,000 tests of occupant restraint devices to evaluate their utility. *Pacific Legal Found.* v. *DOT*, 593 F.2d 1338, 1344 (D.C. Cir.), cert. denied, 444 U.S. 830 (1979).

the result that there "would be no protection for the front seat occupants of such" automobiles. *Id.* at 29001.

To allay public concerns, Secretary Dole encouraged manufacturers to offer consumers a choice between automatic (*i.e.*, fully passive) safety belts and airbags. The Secretary noted that "[i]t may be easier to overcome these [public] concerns if airbags are not the only way of complying with an automatic occupant protection requirement. Under the rule being issued, if people have concerns about airbags, they can purchase automobiles that use automatic belts." 49 Fed. Reg. at 29001.

Moreover, the Secretary concluded that FMVSS 208 should give manufacturers a choice among design options, because a rule requiring the installation of a particular passive restraint device would stifle innovation in occupant protection systems (49 Fed. Reg. at 29001):

> [The Department] believes that by taking away the manufacturers' discretion to comply with an automatic occupant restraint requirement through the use of a variety of technologies, it creates a number of problems. First, by restricting the manufacturers, the Department runs the risk of killing or seriously retarding development of more effective, efficient occupant protection systems. * * * Similarly, the development of passive interiors, being pursued by GM, would be stymied under such an option.

Thus, Secretary Dole specifically found that a rule mandating a particular restraint device would be contrary to federal safety policy and goals.

The 1984 revision of FMVSS 208 was affirmed on judicial review in *State Farm*, 802 F.2d at 487-489. The D.C. Circuit noted that the Secretary's decision rested on a meticulous weighing of competing interests. *Id.* at 487-488 & n.27. The court held that "such details of cost-benefit analysis are 'most appropriately entrusted to the expertise of

an agency'" and affirmed the conclusion that public concerns about passive restraints could "best be addressed through real-world experience in the marketplace rather than by regulatory fiat." *Id.* at 488.

In 1991, Congress amended the Safety Act to require NHTSA to modify FMVSS 208 to mandate airbags in 95% of 1997-model automobiles and 100% of 1998 models. Pub. L. No. 102-240, § 2508, 105 Stat. 2086.[4] Nonetheless, the debate over airbag technology and safety continues to the present day: NHTSA recently announced the need to implement "a comprehensive plan of rulemaking and other actions * * * addressing the *adverse* effects of airbags." 62 Fed. Reg. 798 (1997) (emphasis added). Specifically, NHTSA noted that "while passenger side air bags are estimated to have saved 164 lives to date, they have also killed 32 children in relatively low speed collisions. Eighteen of those deaths" occurred in 1996. *Ibid.*

3. At the time the 1987 Volkswagen Golf at issue in this case was built, FMVSS 208 provided three design "options" for occupant restraint systems and performance requirements for each:

1. Complete passive protection for all crashes (S4.1.2.1);
2. Passive restraints for head-on crashes (S4.1.2.2); or
3. Lap and shoulder belt protection systems with belt warnings (manual three-point seat belts) (S4.1.2.3).

Federal regulations thus gave manufacturers a choice among any one of these three designs, subject to the requirement that they equip no less than 10% of their 1987 models sold in the

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[4] In passing this legislation, Congress noted that it did not seek to change the preemptive effect of FMVSS 208 for automobiles manufactured without airbags *before* they were required by federal law. Pub. L. No. 102-240, § 2508(d), 105 Stat. 2086.

United States with fully passive occupant restraint systems (S4.1.3.1.2).

The second option under FMVSS 208, which was selected for the 1987 Golf, protected automobile occupants "by means that require no action by [the] occupants * * *" (49 C.F.R. § 571.208, S4.1.2.2(b)).[5] The regulations expressly provided that "a seat belt assembly that requires no action by vehicle occupants * * * may be used to meet the crash protection requirements of any option under S4. and in place of any seat belt assembly otherwise required by that option." *Id.* at § 571.208, S4.5.3. In sum, a manufacturer could comply with FMVSS 208 by installing passive seat

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[5] The second design option in FMVSS 208 provided in full:

> S4.1.2.2 *Second option—head-on automatic protection system.* The vehicle shall—
>
> (a) At each designated seating position have a Type 1 seat belt assembly or Type 2 seat belt assembly with a detachable upper torso portion that conforms to S7.1 and S7.2 of this standard;
>
> (b) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, by means that require no action by vehicle occupants;
>
> (c) At each front outboard designated seating position, meet the frontal crash protection requirements of S5.1, in a perpendicular impact, with a test device restrained by a Type 1 seat belt assembly; and
>
> (d) At each front outboard designated seating position, have a seat belt warning system that conforms to S7.3.

See also 49 C.F.R. § 571.208, S4.5.3.

belts that met the performance requirements of any of the three restraint system design options with no manually activated seat belts at all.

B. Factual And Procedural Background

Dorothy Zimmerman was killed in an automobile accident in March 1989 while driving a 1987 Golf, which was manufactured by respondents Volkswagen of America, Inc., and Volkswagen AG (sued as Volkswagen Aktiengesellschaft) (collectively Volkswagen). Pet. App. 2. Petitioners, surviving members of Zimmerman's family, sued Volkswagen in Idaho state court, alleging that the 1987 Golf was "defectively designed because it lacked a driver's-side lap belt," and that, "if the car had not been defectively designed, Ms. Zimmerman would have survived the crash." Pet. 4.

The occupant restraint system in the 1987 Golf, "identified by its acronym VWRA, is a 'passive' system requiring no action on the part of the occupant to actuate it." Pet. App. 4. It consists of (*id.* at 4-5):

> a shoulder belt which is anchored to the seat on the inboard side and to the door on the outboard side and includes a padded knee bar under the dash and a specially designed seat to minimize submarining. There is no lap belt and, when the door closes, the shoulder belt is automatically positioned across the occupants's chest.

Petitioners conceded that the fully passive VWRA system complied with the second option under FMVSS 208 by protecting vehicle occupants "by means that require no action by [the] occupants * * *." 49 C.F.R. § 571.208, S4.1.2.2(b).[6] They maintained, however, that the VWRA

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[6] NHTSA expressly determined in 1974 that Volkswagen's passive restraint system met the requirements of option two of FMVSS 208 without manual seat belts, concluding that "[o]ption two exists * * * to accommodate the introduction of passive restraint systems like Volkswagen's." 39 Fed. Reg. 3834, 3834

system was defective under state tort law because it did not have a manual lap belt. Pet. App. 5.

On Volkswagen's motion for summary judgment, the trial court held that petitioners' tort claims were preempted by the Safety Act. Pet. App. 14-15. "Because plaintiffs' claims would impose a state law requirement that differs from the explicit passive restraint option granted by the" Safety Act and FMVSS 208, the court held that "those claims are expressly preempted." *Id.* at 14. The court also held that petitioners' claims are impliedly preempted because they "would frustrate the federal policies and purposes of the Safety Act, Safety Standard 208 and the federal regulatory scheme by upsetting the careful balancing of safety considerations on which the Secretary of Transportation's decision to grant passive restraint options rested." *Id.* at 15.

C. The Idaho Supreme Court's Decision

On appeal, the Supreme Court of Idaho affirmed the summary judgment for Volkswagen, concluding that petitioners' "claims against Volkswagen for failure to include a lap belt with the VWRA are preempted by the express preemption provisions of the Safety Act." Pet. App. 7. The court held that the preemption provision of the Act (Section 1392(d)) includes within its scope "common law claims" and that the "general savings clause" in Section 1397(k) cannot be read "to permit common law actions that undermine federal policy * * * [and] conflict with federal law * * *." Pet.

(1974); see also *O'Bryan* v. *Volkswagen of America, Inc.*, 838 F. Supp. 319, 324 (W.D. Ky. 1992) (Volkswagen's two-point passive restraint system met requirements of second option of FMVSS 208). Since then, three Secretaries of Transportation have approved (and lauded) the use of the automatic seat belts in Volkswagen's passive restraint system. See, *e.g.*, 41 Fed. Reg. 24070, 24070 n.2, 24072 (1976) (Secretary Coleman); 42 Fed. Reg. 34289, 34295 (1977) (Secretary Adams); 49 Fed. Reg. 28962, 28999 (1984) (Secretary Dole).

App. 7-8. Because the court decided that petitioners' claims were expressly preempted, it did "not address Volkswagen's contention that these claims are impliedly preempted * * *." Pet. App. 8.

REASONS FOR DENYING THE PETITION

The petition presents a narrow, factbound issue for review by this Court: whether the Safety Act and FMVSS 208 *expressly* preempt a tort claim that an automobile was defective because its fully passive occupant restraint system did not include a *manual lap belt*. Petitioners seek to convert this modest, non-certworthy issue into a more substantial one by focusing almost entirely on a quite different question: whether the Safety Act and FMVSS 208 *impliedly* preempt a tort claim that an automobile was defective because it lacked an *airbag*. But that issue, on which two state courts of last resort have diverged from the unanimous view of the federal courts of appeals, is not presented in this case.

Instead, the question presented here has been addressed by only a handful of lower courts — and not by a single federal court of appeals. Moreover, the decision by the Supreme Court of Idaho does not conflict with the decision of any other state supreme court. And, in any event, the express preemption decision in this case is correct. There is therefore no reason to grant the petition.

A. There Is No Conflict In The Lower Courts Over The Question Whether FMVSS 208 Preempts "No Lap Belt" Claims

Contrary to the assertion at the outset of petitioners' lead argument (Pet. 7), there is not a "growing conflict among the federal courts of appeal[s] and the state courts of last resort over" the question presented in this case: whether the Safety Act expressly preempts "no lap belt" claims. Petitioners cite only five other cases that have ever considered the issue

whether "no lap belt" claims are preempted — either expressly or impliedly — by the Safety Act and FMVSS 208.[7]

To create the illusion of mass confusion in the lower courts over the question presented here — and to raise the specter of "thousands of automobile design defect lawsuits pending throughout the nation" (Pet. 15) — petitioners combine the very large number of decisions on the question whether "no airbag" claims are preempted by FMVSS 208 with the handful of "no lap belt" cases. "In comparison with no-airbag cases," however, "there are few preemption cases dealing with seatbelts anywhere." *Alvarado* v. *Hyundai Motor Co.*, 908 S.W.2d 243, 250-251 (Tex. App. 1995), app. pending, No. 95-0969 (Tex.). In fact, *no* federal court of appeals has addressed the "no lap belt" preemption issue and only *one* other state supreme court — the Arizona Supreme Court in *Hernandez-Gomez* v. *Leonardo*, 917 P.2d 238 (Ariz. 1996) — has decided that question.

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[7] Petitioners cite (Pet. 15-16): *Hernandez-Gomez* v. *Leonardo*, 917 P.2d 238 (Ariz. 1996) (no lap belt, no preemption in roll-over accident); *Ketchum* v. *Hyundai Motor Co.*, 57 Cal. Rptr.2d 595 (Cal. App. 1996) (no lap belt claim not preempted); *Alvarado* v. *Hyundai Motor Co.*, 908 S.W.2d 243 (Tex. App. 1995), app. pending, No. 95-0969 (Tex.) (no lap belt claim not preempted); *Dykema* v. *Volkswagenwerk AG*, 525 N.W.2d 754 (Wis. App. 1994), cert. denied, 116 S. Ct. 60 (1995) (no lap belt claim preempted); *Miranda* v. *Fridman*, 647 A.2d 167 (N.J. App.), certif. denied, 649 A.2d 1291 (N.J. 1994) (no lap belt claim preempted).

Of the decisions cited by petitioners, only two (*Ketchum* and *Alvarado*) decide the express preemption issue presented in this case contrary to the result reached by the Idaho Supreme Court. And both *Ketchum* and *Alvarado* are now under review by their state's supreme court.

Moreover, the *Hernandez-Gomez* decision, in which the court held that there was no preemption of the particular "no lap belt" claim asserted (917 P.2d at 246), is limited explicitly to roll-over accidents. The court acknowledged that there could be implied conflict preemption of common law tort claims under the Safety Act. *Id.* at 245. Focusing on the "specific facts" of the case, however, the court noted that "the option Volkswagen chose — S4.1.2.2(b) — applies only to the performance requirement of the restraint system in a frontal crash." *Id.* at 246. As a result, the court concluded that (*ibid.*):

> Volkswagen could argue that a state common-law tort claim, which alleges that a defective design failed to protect occupants in front-end accidents, is preempted if federal regulatory requirements for performance in front-end accidents were met. Volkswagen cannot, however, make that preemption claim with regard to rollover accidents because the federal standard it chose did not address design or performance requirements for that type of accident.

Thus, the holding of *Hernandez-Gomez* is, by its own terms, applicable *only* to the unusual claim (not asserted by petitioners here) that an automobile involved in a roll-over accident was defective because it lacked a manual lap belt. That decision creates no conflict with this case.[8]

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[8] By the same token, the early case law interpreting the Safety Act cited by petitioners (Pet. 8-11) is irrelevant to the question whether "no lap belt" claims are expressly preempted by FMVSS 208. In virtually all of the cases cited, preemption was not at issue and the word "preemption" does not even appear in the courts' opinions. The cases merely confirm that compliance with a Federal Motor Vehicle Safety Standard does not constitute a defense to a product liability action if no FMVSS governs the specific design feature alleged by the plaintiff to be defective — *i.e.*, the Act does not preempt the entire field of motor vehicle safety. See, *e.g.*,

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Schwartz v. *American Honda Motor Co.*, 710 F.2d 378, 383 (7th Cir. 1983) ("there were no federal standards governing the relevant portions of the" vehicle); *Dorsey* v. *Honda Motor Co.*, 655 F.2d 650, 656 (5th Cir. 1981) (FMVSSs "are unrelated to several of the design deficiencies developed by the plaintiffs' evidence"), cert. denied, 459 U.S. 880 (1982); *Knippen* v. *Ford Motor Co.*, 546 F.2d 993 (D.C. Cir. 1976). Indeed, many of the cited cases involved allegations of defects in vehicles designed and manufactured before *any* pertinent federal Safety Standards had been promulgated.

Perhaps most important, none of the cases cited involved passive restraints. In fact, petitioners cite decisions rendered by courts that subsequently held that common law tort claims were preempted by FMVSS 208. Compare, *e.g.*, *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990) ("no airbag" claim preempted), with *Dawson* v. *Chrysler Corp.*, 630 F.2d 950 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981) (compliance with FMVSS was not complete defense to claim that vehicle was defective because of noncontinuous body frame); and *Montag* v. *Honda Motor Co.*, 75 F.3d 1414 (10th Cir.), cert. denied, 117 S. Ct. 61 (1996) ("no airbag" claim preempted), with *Fox* v. *Ford Motor Co.*, 575 F.2d 774 (10th Cir. 1978) (compliance with federal safety standards was not complete defense to claim that rear-seat lap safety belt was defectively designed).

Several of the early tort suits involved the claim that a motor vehicle's roof was improperly designed. Although FMVSS 216 prescribes "a minimum level of roof strength," *Sours* v. *General Motors Corp.*, 717 F.2d 1511, 1516-1517 (6th Cir. 1983), it does not prescribe any design features, *id.* at 1516, and thus there is no conflict between the federal performance standard and a defective design claim for a particular vehicle's roof. See also *Stonehocker* v. *General Motors Corp.*, 587 F.2d 151 (4th Cir. 1978); *Shipp* v. *General Motors Corp.*, 750 F.2d 418 (5th Cir. 1985). As the Sixth Circuit noted in *Sours*, "utilization of officially approved design features * * * is far different from compliance with the threshold FMVSS 216 standard, which by its terms sets only a minimum

In sum, the Idaho Supreme Court's decision on express preemption of "no lap belt" claims under the Safety Act does not conflict with *any* decision of *any* state supreme court or *any* federal court of appeals.

B. The Narrow Decision In This Case On Express Preemption Of "No Lap Belt" Claims Does Not Merit Review By This Court

1. The occasional "no lap belt" cases decided by the lower courts over the past decade are atypical of the large number of FMVSS 208 cases involving "no airbag" claims. In a "no lap belt" case, the plaintiff contends that a fully passive, two-point seat belt system was defective under state tort law because it did not have a manual lap belt. As the tiny handful of decisions on this issue suggests, only a relatively small number of automobiles with fully passive, two-point seat belt systems were ever built, and even fewer remain on the road today.

By contrast, a "no airbag" claim — *i.e.*, the contention that an automobile was defective under state tort law because it was not equipped with an airbag — can be made about any automobile built without an airbag, regardless of the type of seat belts in the car. For example, petitioners in this case could have argued that the 1987 Golf was defective because it lacked an airbag. See Pet. 25 (Volkswagen "could have installed a lap belt (or for that matter, an airbag) in Ms. Zimmerman's 1987 Volkswagen Golf * * *"). There are a vast number of automobiles on the road that could be subject to that claim.

Not surprisingly, there are a great many "no airbag" decisions and, as discussed in the petition (at 11-14), the lower courts are divided over whether "no airbag" claims are impliedly preempted by FMVSS 208. Four federal courts of appeals and the Supreme Court of Mississippi have held that

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level of roof strength." 717 F.2d at 1517.

"no airbag" claims are impliedly preempted.[9] Two state courts of last resort, on the other hand, have held that such claims are not preempted.[10] The issue is now pending in at least one federal court of appeals and two state supreme courts.[11]

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[9] See *Montag* v. *Honda Motor Co.*, *supra*; *Pokorny* v. *Ford Motor Co.*, *supra*; *Taylor* v. *General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1989); *Cooper* v. *General Motors Corp.*, No. 92-CA-01334-SCT, 1996 WL 272362 (Miss. May 23, 1996).

Contrary to the suggestion in the petition (at 13-14), the Eleventh Circuit in *Doyle* v. *Volkswagenwerk Aktiengesellschaft*, 81 F.3d 139 (1996), did not repudiate its prior holding in *Taylor*. In *Doyle*, the court of appeals was not reviewing a preemption decision, but rather a district court ruling "[f]inding plaintiffs' claims precluded under Georgia law * * *." *Id.* at 141. The Eleventh Circuit merely certified to the Supreme Court of Georgia "an unanswered question of Georgia law that [was] determinative of th[e] appeal." *Id.* at 140. To the extent that the court in *Doyle* indicated any view regarding preemption of "no airbag" claims, it indicated that *Taylor* had correctly held such claims preempted because of the conflict between such claims and applicable federal law. *Id.* at 142.

[10] See *Ford Motor Co.* v. *Tebbetts*, 165 A.2d 345 (N.H. 1995), cert. denied, 116 S. Ct. 773 (1996); *Wilson* v. *Pleasant*, 660 N.E.2d 327 (Ind. 1995).

[11] See *Harris* v. *Ford Motor Co.*, No. 94-56527 (9th Cir.); *Minton* v. *Honda of Am. Mfg., Inc.*, No. 14949, 1996 WL 402070 (Ohio App. 1996), rev. granted, No. 96-2006 (Ohio Oct. 23, 1996); *Cellucci* v. *General Motors Corp.*, 676 A.2d 253 (Pa. Super. 1996), rev. granted, No. 0379 (Pa. Oct. 22, 1996).

Given the differences in both legal analysis and practical importance between "no lap belt" and "no airbag" cases, it would be most inappropriate for this Court to grant review of a "no lap belt" case if it wishes to enter the preemption debate under FMVSS 208. In light of the extended and unusual history of airbag development and regulation by NHTSA and Congress (see pages 2-8, *supra*), a decision in a "no lap belt" case would not necessarily have broad, dispositive significance for "no airbag" claims. In the case of airbags, there is a lengthy "decision [by the Secretary of Transportation in 1984] not to require airbags," which was affirmed on appeal in *State Farm*, 802 F.2d at 487-489; see U.S. Br. in *Freightliner Corp.* v. *Myrick*, 115 S. Ct. 1483 (1995) at 28 ("The Secretary explicitly determined that an all-airbag rule would have disserved the safety purposes of the Act"). There are separate policy concerns, and a separate regulatory history, with respect to manual lap belts in automobiles equipped with fully passive, two-point seat belt systems.

Accordingly, "the implied preemption analysis that is used in determining a no-airbag case is not equivalent to a claim that the design of a seat belt system is defective." *Alvarado*, 908 S.W.2d at 249. Although Volkswagen believes that the preemption analysis in "no airbag" cases informs (and may control) the decision whether "no lap belt" claims are preempted (*id.* at 253 ("some of the language in no-airbag cases is useful")), some courts have indicated that "the ultimate dispute [is] different" in "no lap belt" cases (*ibid.*). The Solicitor General has taken that same position before this Court (U.S. Br., *Myrick*, at 28 (footnote omitted; emphasis added)):

> [C]ommon law tort actions that imposed liability for failure to install airbags (*as opposed to other types of passive restraint devices*) could, as a practical matter, have compelled manufacturers to install airbags * * *. Because such a result would have frustrated the Secre-

> tary's policy judgment and would have had an adverse effect on safety, we [have] argued * * * that such suits were preempted.

Indeed, petitioners themselves espoused the view in the courts below that Volkswagen's "reliance on 'air bag' cases is misplaced." Memorandum in Support of Plaintiff's Response to Defendant's Motion for Summary Judgment Based on Federal Preemption at 8. They told the trial court (*id.* at 8-9): "As the court in *Welsh* [v. *Century Prods.*, 745 F. Supp. 313, 316 (D. Md. 1990)], concluded, 'given the unique nature of the statutory and regulatory scheme surrounding the air bag regulation, the numerous cases addressing the issue of preemption in that context are not even particularly helpful' in a different design context." And they made a similar argument to the Idaho Supreme Court. See Appellant's Brief at 36 (distinguishing precedents cited by Volkswagen because "*every one* of those cases involved the federal preemption of the so-called 'no airbag' case") (emphasis in original).

2. The question presented in this case is yet further limited to the issue of *express* preemption of "no lap belt" claims under the Safety Act. Because of its express preemption holding, the Idaho Supreme Court's decision did "not address Volkswagen's contention that [petitioners'] claims are impliedly preempted." Pet. App. 8. Recognizing the limited scope of the decision below, petitioners raise only the issue of express preemption in their petition (Pet. i, 7).

The question of implied preemption under the Safety Act is therefore not properly presented to this Court. See S. Ct. Rule 14.1(a) ("[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court"); *United States* v. *Williams*, 504 U.S. 36, 40-45 (1992); see also Stern, Gressman, Shapiro & Geller, SUPREME COURT PRACTICE, 348 (7th ed. 1993) ("normally the Court will not consider points or questions not raised below *and* in the petition") (emphasis in original).

As a result, even if this atypical "no lap belt" case were otherwise certworthy (which it is not), it does not raise the preemption issue under the Safety Act on which review might plausibly be warranted on the basis of a conflict in the lower courts (see pages 14-15, *supra*). As petitioners acknowledge, *implied* preemption is the dispositive issue contested in the vast majority of cases — both "no airbag" and "no lap belt" — cited in the petition (at 10-15).

Finally, the narrow express preemption question raised by the petition does not warrant review by this Court because the Idaho Supreme Court's decision predated (and therefore took no account of) this Court's decision on express preemption last Term in *Medtronic, Inc.* v. *Lohr*, 116 S. Ct. 2240 (1996). In Safety Act preemption litigation now pending in the lower courts, petitioners' counsel of record has asserted that *Medtronic* represented a substantial change in express preemption law.[12] We disagree that *Medtronic* in fact represents any change in the relevant preemption principles. But if the assertions of petitioners' counsel are correct, then it makes little sense for this Court to review an express preemption ruling issued before *Medtronic* was decided.

* * * * *

In sum, the *only* issue presented in this case is whether the Safety Act expressly preempts "no lap belt" claims. That issue has been litigated only rarely, is unlikely to arise with any frequency in the future, and has not engendered any conflict among the federal courts of appeals or the state supreme courts. Although the related question whether "no airbag" claims are impliedly preempted has divided some of

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[12] See, *e.g.*, Brief *Amicus Curiae* for Trial Lawyers for Public Justice, *et al.*, in *Minton* v. *Honda of America Mfg., Inc.*, No. 96-2006 (S. Ct. Ohio); Brief *Amicus Curiae* for Trial Lawyers for Public Justice, *et al.*, in *Cellucci* v. *General Motors Corp.*, No. 0379 (S. Ct. Pa.).

the lower courts, that question is not presented here, and a decision in this case would not necessarily dictate the answer to that question. Review of *this* case therefore would be an inappropriate use of this Court's limited resources.

C. Petitioners' Tort Claims Are Expressly Preempted

In any event, review is not warranted because the Idaho Supreme Court's decision is correct. Both aspects of the decision below are supported by longstanding precedents of this Court: The Safety Act's preemption clause includes within its scope state common-law standards, and the Act's "general savings clause" (Pet. App. 8) does not preserve petitioners' tort claims.

1. This Court's decision in *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504 (1992), eliminates any doubt about whether the safety "standards" referred to in the preemption provision of the Safety Act, 15 U.S.C. § 1392(d), include common-law standards. The Court in *Cipollone* held that the express preemption provision at issue in that case included common-law duties even though it spoke only in terms of "'requirement[s] or prohibition[s] * * * imposed under State law.'" 505 U.S. at 519-524 (plurality) (citation omitted); *id.* at 548-549 (Scalia, J.). The Court stated that it made no difference that the preemption clause "fail[ed] to include a specific" reference to common-law claims. *Id.* at 521; see also *CSX Transp., Inc.* v. *Easterwood*, 507 U.S. 658, 661-676 (1993).

The Court's holding in *Cipollone* was premised on its long-held view that "'[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief.'" 505 U.S. at 521 (quoting *San Diego Bldg. Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959)); see also *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 326 (1981) (a "system under which each State could, through its courts, impose * * * its own * * * requirements could hardly be more at odds with the uniformi-

ty contemplated by Congress").[13] And that holding was reaffirmed only last Term in *Medtronic*, where a majority of the Court explicitly endorsed *Cipollone*'s holding that the word "requirements" encompasses state law tort claims for purposes of federal preemption. 116 S. Ct. at 2259-2260 (Breyer, J., concurring in part and concurring in the judgment); *id.* at 2262-2264 (O'Connor, J., Rehnquist, C.J., and Scalia and Thomas, JJ., concurring in part and dissenting in part).

Since the decision in *Cipollone*, the widely accepted understanding among the federal courts of appeals is that statutory language generically preempting state "law," "requirements" or "standards" necessarily includes claims based on state common law.[14] Indeed, the overwhelming majority of courts across the country have followed *Cipollone* and reached the same conclusion in interpreting the scope of express preemption clauses in numerous federal health and safety statutes, including the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136, *et seq.*,[15] the Feder-

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[13] See also *Asahi Metal Indus. Co.* v. *Superior Court*, 480 U.S. 102, 114-115 (1987) (referring to state common-law "safety standards"); *Shenker* v. *Baltimore & Ohio R.R.*, 374 U.S. 1, 11 (1963) ("negligence standards of the common law").

[14] See, *e.g.*, *Lynnbrook Farms* v. *SmithKline Beecham Corp.*, 79 F.3d 620, 627-629 (7th Cir.), cert. denied, 117 S. Ct. 178 (1996); *Moe* v. *MTD Prods., Inc.*, 73 F.3d 179, 182 (8th Cir. 1995); *King* v. *E.I. DuPont de Nemours & Co.*, 996 F.2d 1346, 1349 (1st Cir.), cert. dismissed, 510 U.S. 985 (1993); *Papas* v. *Upjohn Co.*, 985 F.2d 516, 517 (11th Cir.), cert. denied, 510 U.S. 913 (1993); *Stamps* v. *Collagen Corp.*, 984 F.2d 1416, 1424 (5th Cir.), cert. denied, 510 U.S. 824 (1993).

[15] See, *e.g.*, *Grenier* v. *Vermont Log Bldgs. Inc.*, 96 F.3d 559 (1st Cir. 1996); *MacDonald* v. *Monsanto Co.*, 27 F.3d 1021, 1024 (5th Cir. 1994).

al Hazardous Substances Act, 15 U.S.C. §§ 1261, *et seq.*,[16] and the Federal Boat Safety Act, 46 U.S.C. §§ 4301, *et seq.*[17]

In light of these precedents, the Idaho Supreme Court correctly concluded that the state "standards" preempted by Section 1392(d) include common-law standards. That decision does not merit review by this Court.

2. In urging this Court to review the express preemption issue in this case, petitioners rely (Pet. 11-15) on cases interpreting the Safety Act's so-called "savings" clause, 15 U.S.C. § 1397(k). Petitioners maintain that, contrary to the holding of the Idaho Supreme Court (Pet. App. 8), this clause shelters all common-law claims from preemption.[18]

a. The text, structure, and legislative history of Section 1397(k) demonstrate that it was not intended by Congress to restrict the scope of express preemption by excluding tort

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[16] See, *e.g.*, *Moss* v. *Parks Corp.*, 985 F.2d 736, 740 (4th Cir.), cert. denied, 509 U.S. 906 (1993).

[17] See, *e.g.*, *Carstensen* v. *Brunswick Corp.*, 49 F.3d 430 (8th Cir.), cert. denied, 116 S. Ct. 182 (1995).

[18] Petitioners also spend much of the petition (Pet. 18-22) addressing the spurious argument that this Court's decision in *Cipollone* radically changed federal preemption law and precludes resort to implied preemption analysis in the face of an express preemption clause. This argument was emphatically rejected as entirely "without merit" by a unanimous Court in *Myrick*, 115 S. Ct. at 1487. See also *Medtronic*, 116 S. Ct. at 2259 (rejecting express preemption argument but stating that tort claim might "be pre-empted under conflict pre-emption analysis"). In any event, the argument is irrelevant in this case, which is limited to express preemption.

claims.[19] Instead, the narrow language of Section 1397(k), which states that "compliance with any Federal motor vehicle safety standard * * * does not exempt any person from any liability under common law," by its terms negates only an affirmative common-law defense of compliance with a government standard. Significantly, the clause does not refer to preemption or to the limits of federal supremacy; indeed, as the Safety Act was originally drafted, it was not even included in the part of the Act, Section 1392(d), that addresses federal preemption.[20]

In addition, the text of Section 1397(k) differs significantly from the language employed by Congress both in the Safety Act and in many other statutes when it intended to restrict the scope of federal preemption. In the preemption section of the Safety Act, for example, Congress included two savings clauses restricting the scope of preemption:

> *Nothing in this section shall be construed* as preventing any State from enforcing any safety standard which is identical to a Federal safety standard. *Nothing in this*

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[19] The statute in *Cipollone*, unlike the Safety Act, lacked a savings clause. But this Court found express preemption of common-law claims in *Easterwood*, 507 U.S. at 661-676, and the statute at issue in that case had a savings clause. See also *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 378, 383-391 (1992) (finding express preemption under the Airline Deregulation Act, which has a savings clause).

[20] When Congress recodified the Safety Act in 1994, both Section 1392(d) and Section 1397(k) were appropriately placed in a new section, 49 U.S.C. § 30103, entitled "Relationship to other laws." Significantly, however, Section 1392(d) was placed in 49 U.S.C. § 30103(b), labeled "Preemption," whereas Section 1397(k) was placed in an entirely different subsection, 49 U.S.C. § 30103(e), whose title ("Common law liability") makes no reference to the Supremacy Clause or federal preemption. See Pub. L. 103-272, § 1(e), 108 Stat. 943.

> *section shall be construed* to prevent the Federal Government or the government of any State or political subdivision thereof from establishing a safety requirement applicable to motor vehicles or motor vehicle equipment procured for its own use * * *.

15 U.S.C. § 1392(d) (emphases added). This is the all-encompassing phraseology that Congress has traditionally used in a savings clause, rather than the narrow "compliance with" language of Section 1397(k). See, *e.g.*, *John Hancock Mut. Life Ins. Co.* v. *Harris Trust & Sav. Bank*, 510 U.S. 86, 97-98 (1993); *Morales*, 504 U.S. at 508.

Perhaps more important, the structure of the Safety Act shows that Section 1397(k) was not intended by Congress to be a sweeping exception to Section 1392(d). Section 1397(k) appears in a wholly separate section of the Act from Section 1392(d), which refers expressly to preemption and which contains two explicit savings clauses. Certainly, if Congress had intended Section 1397(k) to be an expansive third exception to the preemption provision in Section 1392(d), it would have included the language of Section 1397(k) alongside the other express savings clauses in Section 1392(d).

Finally, the legislative history of the Safety Act is further evidence that Section 1397(k) was not intended to carve a gaping hole in the preemption provision. Both the House and Conference Reports contain sections entitled "Preemption," but neither section discusses Section 1397(k). See H.R. Conf. Rep. No. 89-1919, at 16 (1966), *reprinted in* 1966 U.S.C.A.A.N. 2731, 2731-2733; H.R. Rep. No. 89-1776, *supra*, at 17. The House Report mentions Section 1397(k) under the heading "Prohibited Acts and Exemption," and the Conference Report does not deal with it at all. Again, if Congress had intended Section 1397(k) to be a sweeping exception to the preemption provision, it surely would have described it as such in these reports. See *Chisom* v. *Roemer*, 501 U.S. 380, 396 (1991). Rather, as its language indicates, Section 1397(k) was added merely to clarify that the Safety

Act did not create an affirmative defense of compliance with government standards — or, as we next show, that the Safety Act was not intended to occupy the entire field of motor vehicle safety. In this case, Volkswagen never argued that compliance with FMVSS 208 was an affirmative defense.

b. Even if it were viewed as a limitation on the Safety Act's broad preemption provision, Section 1397(k) indicates, at most, Congress' intent not to occupy the entire field of motor vehicle safety, so that common-law claims could continue to be brought in areas not covered by a federal Safety Standard. Faced with similar provisions in other statutes, this Court has consistently interpreted them in this fashion. In *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, *supra*, for example, which held that a broadly worded savings clause was inapplicable where the plaintiff sought to impose common-law liability for acts expressly permitted by a federal agency, the Court explained that general savings clauses do not allow states to enforce state-law claims that conflict with federal law. 450 U.S. at 328. Rather, general savings clauses are included in federal statutes because, without them,

> it might have been claimed that, Congress having entered the field, the whole subject of liability * * * had been withdrawn from the jurisdiction of the state courts, so [the savings clause] was added to make plain that the Act was not intended to deprive the state courts of their general and concurrent jurisdiction.

Ibid. (internal quotation marks omitted).

Similarly, in *Pennsylvania R.R.* v. *Puritan Coal Mining Co.*, 237 U.S. 121, 129 (1915), the Court found that a savings clause "was added at the end of the statute — not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections — but to preserve all existing rights which were not inconsistent with those created by the statute." And in *Texas & Pac. Ry.* v. *Abilene Cotton Oil*

Co., 204 U.S. 426, 446 (1907), the Court held that a broad savings clause ("[n]othing in this act contained shall in any way abridge or alter [common-law] remedies" (internal quotations omitted)) could not be read to save common-law rights "the continued existence of which would be absolutely inconsistent with the provisions of the act." Such a reading, the Court instructed, would cause the federal statute to "destroy itself." *Ibid.*

This Court has long adhered to these pronouncements. See, *e.g.*, *Morales*, 504 U.S. at 383-385; *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 493-494 (1987); *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 223, 230 (1986); *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 298-299 (1976). Consistent with these precedents, Section 1397(k) was added to the Safety Act not to defeat the statutory goal of creating a set of nationally uniform motor vehicle safety standards, but rather to indicate Congress' intent not to preempt the remainder of the field of motor vehicle safety not covered by and not inconsistent with those federal standards.[21]

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[21] This case is a good example: FMVSS 208 expressly grants, for safety reasons (see pages 4-6, *supra*), a choice of several types of safety restraint designs for automobiles. Section 1397(k) would thereby preserve a common-law claim that a restraint system was negligently manufactured or installed, because those subjects are not addressed by — and do not conflict with — any Federal Motor Vehicle Safety Standard. On the other hand, that section would not preserve a common-law action, such as the claim under review here, seeking to recover damages from a defendant merely for exercising the federally-granted option to utilize a passive restraint system design approved by NHTSA. Such a lawsuit is manifestly inconsistent with FMVSS 208 because it extinguishes a choice granted, as a matter of safety policy, by the federal government. Cf., *e.g.*, *Perry* v. *Mercedes Benz of North Am., Inc.*, 957 F.2d 1257, 1265 (5th Cir. 1992) (distinguishing a failure-to-install-airbag claim from a claim that a particular airbag system was not properly designed, and holding that the latter claim is not preempted).

D. Petitioners Offer No Reason To Distinguish This Case From The Many Other Safety Act Preemption Cases In Which The Court Has Recently Denied Certiorari

This Court has denied certiorari in recent years in every one of the many FMVSS 208 preemption cases in which review was sought.[22] Petitioners offer no reason to distinguish this case from these other cases in which review was denied. Indeed, this case is far less certworthy because of the limited holding of the Idaho Supreme Court and the atypical "no lap belt" claim asserted by petitioners.

What is more, even if there were merit to petitioners' express preemption argument, they would still not prevail on remand. Their tort claims are impliedly preempted by the Safety Act because they conflict with FMVSS 208. See *English* v. *General Elec. Co.*, 496 U.S. 72, 79 (1990); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). At the time the 1987 Golf was manufactured, FMVSS 208 gave Volkswagen the option to install fully passive, automatic two-point safety belts with no manually-activated lap belts. FMVSS 208 was

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[22] See *Montag* v. *Honda Motor Co.*, 75 F.3d 1414 (10th Cir.), cert. denied, 117 S. Ct. 61 (1996); *Ford Motor Co.* v. *Tebbetts*, 165 A.2d 345 (N.H. 1995), cert. denied, 116 S. Ct. 773 (1996); *Hyundai Motor Co.* v. *Phillip*, 639 So.2d 1064 (Fla. App. 1994), cert. denied, 115 S. Ct. 901 (1995); *Dykema* v. *Volkswagenwerk AG*, 525 N.W. 2d 754 (Wis. App. 1994), cert. denied, 116 S. Ct. 60 (1995); *Pokorny* v. *Ford Motor Co.*, 902 F.2d 1116 (3d Cir.), cert. denied, 498 U.S. 853 (1990); *Nissan Motor Corp.* v. *Superior Court*, 261 Cal. Rptr. 980 (Cal. App. 1989), cert. denied, 494 U.S. 1066 (1990); *Taylor* v. *General Motors Corp.*, 875 F.2d 816 (11th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Kitts* v. *General Motors Corp.*, 875 F.2d 787 (10th Cir. 1989), cert. denied, 494 U.S. 1065 (1990); *Wood* v. *General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988), cert. denied, 494 U.S. 1065 (1989); *Wickstrom* v. *Maplewood Toyota, Inc.*, 416 N.W.2d 838 (Minn. App. 1987), cert. denied, 487 U.S. 1236 (1990).

consciously designed to give manufacturers a choice among various passive restraint systems, rather than to mandate one particular system (see pages 4-6, *supra*). Any state law that removes or restricts a design option granted by federal law conflicts with federal law and is preempted. See, *e.g.*, *Fidelity Fed. Sav. & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 155 (1982); *Schlotz* v. *Hyundai Motor Co.*, No. C5-96-1207, 1997 WL 10318, at *5 (Minn. App. Jan. 14, 1997) (common law liability for "failure to install lap belts would, in effect, force manufacturers to choose a lap belt option over other options approved under FMVSS 208"). Surely it would frustrate the federal safety policies embodied in FMVSS 208 if state common law could make tortious the use of the VWRA passive restraint system — a system that not only complied with FMVSS 208 but that was expressly approved by NHTSA and lauded by three Secretaries of Transportation (see note 6, *supra*). And it would equally frustrate the federal government's efforts to test the safety, utility, and public acceptability of passive restraints if a state could prevent a manufacturer from putting a fully passive system on the road by imposing massive tort damages for failure to include a manual belt.

In fact, this case presents even stronger grounds for preemption than the ordinary run of FMVSS 208 cases, because one of petitioners' expert witnesses testified at his deposition that Volkswagen should have equipped "100 percent" of its 1987 automobiles with a conventional, active three-point belt system (R. 612). But FMVSS 208 required Volkswagen to equip at least 10% of its 1987-model automobiles with a passive restraint system (see page 4, *supra*). Thus, it would have been impossible for Volkswagen to have complied both with the requirements of FMVSS 208 and with the state standard that petitioners urged in the trial court.

These factors render this case unworthy of review. A decision by this Court on the fact-specific issue presented would have only limited application in other litigation under

FMVSS 208. The Court has already decided a case of modest significance under the Safety Act because of the factual peculiarities of FMVSS 121 and antilock brakes on trucks, see *Myrick*, 115 S. Ct. at 1487-1488. Review of an even more idiosyncratic case involving manual lap belts and the distinctive VWRA passive restraint system in the 1987 Golf would serve very little purpose.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 96-904

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1996

Brian R. Zimmerman, *et al.*,

Petitioners,

v.

Volkswagen of America, Inc., and
Volkswagen Aktiengesellschaft,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Idaho

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15 pp

TABLE OF CONTENTS

Page

A. VOLKSWAGEN DOES NOT CONTEST OUR REASONS FOR GRANTING REVIEW. 1

B. VOLKSWAGEN'S SEPARATE REASONS FOR DENYING REVIEW ARE MERITLESS. 2

CONCLUSION 10

TABLE OF AUTHORITIES

Cases **Page**

Alvarado v. Hyundai Motor Co.,
908 S.W.2d 243 (Tex. App. 1995),
app. pending, No. 95-0969 (Tex.) 5

California Federal Savings and Loan Association v. Guerra, 479 U.S. 278 (1978) 2

Cipollone v. Liggett Group, Inc., 789 F.2d 181 (3d Cir. 1986), *rev'd in part and aff'd in part*, 112 S. Ct. 2608 (1992) 3

Cipollone v. Liggett Group, Inc.,
112 S. Ct. 2608 (1992) 7, 8

Cooper v. General Motors Corp.,
No. 92-CA-01334-SCT, 1996 WL 272363
(Miss. May 23, 1996), *petition for reconsideration pending* (filed June 19, 1996) 4

Dykema v. Volkswagenwerk AG, 525 N.W. 2d 754
(Wis. App. 1994), *cert. denied*, 116 S. Ct. 60 (1995) 4, 5

Ford Motor Company v. Tebbetts, 165 A.2d 345
(N.H. 1995), *cert. denied*, 116 S. Ct. 773 (1996) 1, 4, 9

Freightliner Corp. v. Myrick,
115 S. Ct. 1483 (1995) 1, 4, 7, 8, 9

Holmes v. Century Products, Inc.,
No. HM-86-1008 (D. Md. Dec. 3, 1987) 3

Ketchum v. Hyundai Motor Company,
57 Cal. Rptr. 2d 595 (Cal. App. 1996) 8, 9

Medtronic Inc. v. Lohr, 116 S. Ct. 2240 (1996) 8

Montag v. Honda Motor Co., 75 F.3d 1414
(10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996) 9

Pokorny v. Ford Motor Co., 902 F.2d 116
(3d Cir. 1990) 4

Schlotz v. Hyundai Motor Co., No. C5-96-1207,
1997 WL 10318 (Minn. App. Jan. 14, 1997) 4

Wilson v. Pleasant, 660 N.E. 327 (Ind. 1995) 4

Zimmerman v. Volkswagen of America, Inc.,
920 P.2d 67 (Id. 1996) 4

Statutes

15 U.S.C. § 1392(d) 2, 3, 8

15 U.S.C. § 1397(k) 2, 3, 9

Miscellaneous

Brief of the American Automobile Manufacturers
Association and the Association of International
Auto Manufacturers, Inc. as *Amici Curiae*
Supporting the Petition, *Ford Motor Co. v. Tebbetts*,
No. 95-709 (October Term, 1995) 1

Brief in Opposition, *Ford Motor Co. v. Tebbetts*,
No. 95-709 (October Term, 1995) 9

Petition for a Writ of Certiorari,
Freightliner Corp. v. Myrick, No. 94-286
(October Term, 1994) 7

Respondents' Brief in Opposition,
Montag v. American Honda Motor Company, Inc.
No. 95-1885 (October Term, 1996) 10

Supreme Court Rule 14.1(a) 6

U.S. Dept. of Transp., *Evaluation of The Effectiveness of Occupant Protection* (June 1992) 5

A. VOLKSWAGEN DOES NOT CONTEST OUR REASONS FOR GRANTING REVIEW.

In our petition for a writ of certiorari, we gave three reasons why this Court should grant review. First, we noted that, after twenty years of harmony regarding the Safety Act's preemptive effect, the federal courts of appeal and state courts of last resort are now hopelessly in conflict over (a) whether the Safety Act expressly preempts common law claims, (b) whether the Safety Act's savings clause precludes resort to implied preemption analysis, (c) whether the Safety Act impliedly preempts common law claims, and (d) if it does, which ones and why. Pet. at 7-16. Second, we explained that this Court's decision in *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995) ("*Freightliner*"), has created massive confusion over whether the Safety Act preempts common law claims -- confusion which only this Court can eliminate. Pet. at 16-22. Third, we said that whether the Safety Act preempts common law claims is an important question of federal law. *Id.* at 22-26.

Volkswagen does not contest *any* of these assertions. It does not deny that the lower courts are starkly split over the Safety Act's preemptive effect on common law claims. It does not *mention*, much less contest, our contention that *Freightliner* has lead to this unacceptable state. And it in no way challenges our assertion that the Safety Act's preemptive effect on common law claims is an important question of federal law. Indeed, how could it? Just over a year ago, in *Ford Motor Company v. Tebbetts*, 165 A.2d 345 (N.H. 1995), *cert. denied*, 116 S. Ct. 773 (1996) ("*Tebbetts*"), Volkswagen and its fellow auto manufacturers urged this Court to decide whether compliance with Standard 208 preempts common law claims -- calling this "a question of national importance." Brief of the American Automobile Manufacturers Association and the Association of International Auto Manufacturers, Inc., as *Amici Curiae* Supporting the Petition at 18, *Tebbetts*, No. 95-709 (October Term, 1995).

Volkswagen, however, has an obvious reason for opposing review in this case: VW won below. That being so, VW argues

that review should be denied because (1) this case involves a lap belt, (2) this case involves only the question of express preemption, (3) the decision below is correct, and (4) this Court has denied review in other Safety Act cases. These arguments are meritless.

B. VOLKSWAGEN'S SEPARATE REASONS FOR DENYING REVIEW ARE MERITLESS.

1. Volkswagen's first argument is that review should be denied because this case involves a lap belt. According to VW, that fact alone renders the early Safety Act case law "irrelevant," distinguishes the more recent cases involving airbags, ameliorates the conflict among the lower courts, and makes this case "most inappropriate" for review. Opp. at 10-17. Nothing could be farther from the truth.

To begin with, in determining whether the Safety Act preempts plaintiffs' common law claims, this Court's "sole task is to ascertain the intent of Congress." *California Federal Savings and Loan Association v. Guerra*, 479 U.S. 278, 280 (1978). Here, Congress made its intent exceedingly clear, saying: "Compliance with *any* Federal motor vehicle safety standard . . . shall not exempt *any* person from *any* liability under the common law." 15 U.S.C. § 1397(k) (emphasis added). These words admit of no exception. They do not permit courts to find some common law claims preserved and others preempted on the basis of the type of equipment involved in the case -- whether the equipment is a lap belt, an airbag, a shoulder harness, or even a rear-view mirror.

Similarly, 15 U.S.C. § 1392(d), upon which VW relies, prohibits a State from establishing "*any* safety standard applicable to the same aspect of performance" of a "motor vehicle or item of motor vehicle equipment" as an existing Federal motor vehicle safety standard unless the State standard is "*identical* to the Federal standard." Here, too, nothing in these words allows or authorizes the courts to draw lines, for the purposes of preemption, between lap belts, airbags, shoulder harnesses, or any other item of

equipment to which a Federal standard is applicable.

Thus, if Congress' intent is to be gleaned from Congress' words, the fact that this case involves lap belts (as opposed to airbags) simply does not matter. The legislative history of the Safety Act, moreover, reinforces this conclusion. It confirms both that section 1397(k) was intended to preserve *all* common law claims, *see* Pet. at 24, and that section 1392(d) was intended to preempt *all* State safety standards not *identical* to applicable Federal standards. *See* Opp. at 2-3.

In keeping with Congress' intent, every federal appeals court and state court of last resort to address the issue during the Safety Act's first twenty years held that Congress preserved *all* common law claims, without regard to the type of equipment involved. *See* Pet. at 8-10. Volkswagen contends that these unanimous early cases are "irrelevant" because, "[i]n virtually all of the cases cited, preemption was not at issue." Opp. at 12 n.8. That is not true. As the court said in *Holmes v. Century Products, Inc.*, No. HM-86-1008, slip op. at 13-14 (D. Md. Dec. 3, 1987): "Preemption is as preemption does, and when the question is whether compliance with federal safety standards is as a matter of law dispositive of liability issues -- and this is the question addressed by the Circuit Court cases -- the preemption issue is undoubtedly being addressed." The early cases *did* involve preemption and *do* conflict with the decision below.

Equally unavailing is VW's attempt to define away the recent, stark conflict among the lower courts by distinguishing between "no lap belt" and "no airbag" cases. The case law reveals that VW's distinction makes no difference. The "no-airbag" cases have been decided on grounds in no way limited to those devices. As we explained in our petition at 17, *and VW does not dispute*, the courts began finding "no-airbag" claims impliedly preempted in 1988 by employing the since-rejected approach to implied preemption adopted in *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181 (3d Cir. 1986), *rev'd in part and aff'd in part*, 112 S. Ct. 2608

(1992). As we further showed in our petition at 18-20, *and VW does not dispute*, some courts continue to find "no airbag" claims preempted today because of the confusion caused by this Court's decision in *Freightliner*. These are precisely the same reasons that courts have found "no lap belt" claims preempted. As a result, the "no airbag" cases are being decided on grounds equally applicable to "no lap belt" cases -- and vice versa.

For example, the Supreme Court of Idaho's reasoning below applies just as powerfully to "no airbag" claims as it does to "no lap belt" claims. In Idaho, both types of claims are clearly preempted. *See Zimmerman v. Volkswagen of America, Inc.*, 920 P.2d 67 (Id. 1996). In New Hampshire and Indiana, the state courts of last resort have not considered whether "no lap belt" claims are preempted and need not do so. Those states' "no airbag" cases hold that the Safety Act preserves *all* common law claims, including "no lap belt" claims. *Tebbetts*, 165 A.2d at 345; *Wilson v. Pleasant*, 660 N.E. 327 (Ind. 1995). The other "no airbag" and "no lap belt" cases share the same trait. All are decided on grounds that would apply equally to both types of claims. *Compare, e.g., Pokorny v. Ford Motor Co.*, 902 F.2d 116 (3d Cir. 1990) ("no airbag" claims impliedly preempted because Standard 208 gave manufacturers the "option" to sell cars without airbags), *with Schlotz v. Hyundai Motor Co.*, No. C5-96-1207, 1997 WL 10318, *5 (Minn. App. Jan. 14, 1997) ("no lap belt" claims impliedly preempted because Standard 208 gave manufacturers the "option" to sell cars without lap belts). *See also Cooper v. General Motors Corp.*, No. 92-CA-01334-SCT, 1996 WL 272363 *16 (Miss. May 23, 1996), *petition for reconsideration pending* (filed June 19, 1996) ("no airbag" claims impliedly preempted because states "cannot have any nonidentical laws in any area which is being governed by federal law"). Indeed, in *Dykema v. Volkswagenwerk AG*, 525 N.W. 2d 754 (Wis. App. 1994), *cert. denied*, 116 S. Ct. 60 (1995), the Wisconsin Court of Appeals specifically found, at VW's urging, that there is no substantive difference for preemption purposes between "no airbag" claims and "no lap belt claims."

As *Dykema* illustrates, VW's attempt to distinguish "no airbag" cases from "no lap belt" cases is particularly disingenuous because VW consistently relies on "no airbag" cases to argue that "no lap belt" claims are preempted -- and consistently argues that both types of claims are preempted for exactly the same reasons. *See, e.g.*, Respondents' Brief in the Supreme Court for the State of Idaho at 19-25 (citing *Dykema* and equating "no airbag" and "no lap belt" claims). If review is granted, VW will obviously pursue the same course of conduct before this Court. Indeed, VW's opposition heralds such an approach. It argues that "no lap belt" claims are expressly and impliedly preempted for precisely the same reasons that courts have held "no-airbag" claims preempted. *See* Opp. at 21-27. In fact, not once does VW assert that the preemption question should be decided -- or even analyzed -- differently in regard to "no airbag" and "no lap belt" claims.[1]

Instead, VW advances two "practical" considerations which it says, warrant denial of review because this case involves a lap belt. First, VW argues that the impact of this case will be limited, since "only a relatively small number of automobiles" was sold without lap belts. Opp. at 14. Volkswagen, however, does not say how *many* cars were sold without lap belts (or even how many cars were sold without lap belts by VW). In fact, *over a million* cars were sold without lap belts. *See, e.g.*, U.S. Dept. of Transp., *Evaluation of The Effectiveness of Occupant Protection* 4 (June 1992). The majority of these cars, moreover, were sold by VW -- making the potential impact of this case on VW (and its customers) enormous. In any event, there is no reason to believe that the impact of this case will be limited to "no lap belt" cases,

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[1]VW does say that "some courts have indicated the ultimate dispute is different in 'no lap belt' cases," Opp. at 16 (quotation marks deleted), but it cites only *dicta* from *Alvarado v. Hyundai Motor Co.*, 908 S.W.2d 243 (Tex. App. 1995), *app. pending*, No. 95-0969 (Tex.). VW also says that the Solicitor General has taken different positions on "no airbag" and "no lap belt" claims, but VW does not advocate that approach and does not offer any reason why the Solicitor General's approach could not be adequately considered in this case.

particularly since VW never contends that cases involving lap belts and airbags should be analyzed or decided any differently.

This point is underscored by the second "practical" consideration stressed by VW: the "extended and unusual history of airbag development and regulation by NHTSA and Congress." Opp. at 16. Not once does VW assert that the supposedly-separate regulatory histories of airbags and lap belts (both of which were and are governed by Standard 208) would actually make any difference. The most that VW can say is "a decision in a 'no lap belt' case would not *necessarily* have broad, dispositive significance for 'no airbag' claims." Opp. at 16 (emphasis added). But, given Congress' clear words and VW's utter failure to articulate *a reason why* "no lap belt" and "no airbag" claims would be decided differently, that equivocal assertion carries no weight. The fact that this case involves a lap belt is simply not a reason to deny review.

2. Volkswagen's second argument is that review should be denied because only the question of express preemption has been preserved for review. Opp. at 17-18. This argument is frivolous.

In reality, both express and implied preemption were squarely presented to the courts below. The trial court found both express and implied preemption. Pet. App. 14-15. On review, the Supreme Court of Idaho said, "Because we find the Zimmermans' claims to be expressly preempted by the Safety Act, we do not address Volkswagen's contention that these claims are impliedly preempted as well." Pet. App. 8. Thus, even if express and implied preemption are properly viewed as separate questions, both were preserved for review by this Court.

Similarly, both express and implied preemption were encompassed within the petition and, therefore, properly presented to this Court. Supreme Court Rule 14.1(a) provides that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Here, petitioners complied fully with that rule. The question presented, by its terms, raises the entire

issue of preemption; it does not separately mention, much less distinguish between, express and implied preemption.[2] Moreover, the petition discusses both express and implied preemption at length – in reviewing the conflict among the lower courts, the confusion caused by *Freightliner*, and the importance of the federal question presented. The petition even explains why the implied preemption decisions are wrong. *See, e.g.*, Pet. at 23 ("The decision below and the implied preemption decisions also contravene Congress' plain statement of intent.") Well aware of these facts, VW argues in its opposition that petitioners' claims are both expressly and *impliedly* preempted. Opp. at 21-25 (express), 26-27 (implied). The entire question of preemption is, therefore, plainly before this Court.[3]

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[2]The question presented is "Whether the National Traffic and Motor Vehicle Safety Act preserves common law claims from federal preemption by expressly stating that '[c]ompliance with any Federal motor vehicle safety standard . . . does not exempt any person from any liability under common law,' 15 U.S.C. § 1397(k); or whether, as the Supreme Court of Idaho held, *Freightliner Corp. v. Myrick*, 115 S. Ct. 1483 (1995), requires a finding that common law claims are preempted whenever an auto manufacturer complies with a Federal motor vehicle safety standard?" Pet. at i.

[3]While VW's argument is somewhat unclear, VW seems to be contending that the question presented fails to include implied preemption because it only offers the Court the choice of two rulings, neither of which is a finding of implied preemption. Opp. at 17. The specific choices offered in the question presented, however, do not matter as long as the question presented encompasses all of the issues or they are fairly included in the petition. For example, in *Freightliner*, 115 S. Ct. at 1483, the question presented was, "[w]hether the National Traffic and Motor Vehicle Safety Act preempts state common-law standards that conflict with federal standards adopted pursuant to the Act for reasons of safety and practicability; or whether, as the Eleventh Circuit held, one sentence in *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2618 (1992), forecloses such preemption." Petition for a Writ of Certiorari at (i), *Freightliner*, No. 94-286 (October Term, 1994). The Court granted review and rejected both choices set forth in the question presented, finding no preemption for entirely different reasons. *Freightliner*, 115 S. Ct. at 1487-88.

3. Volkswagen's third argument -- that the express preemption decision below is correct -- is not a reason for denying review. To the contrary, it starkly underscores the need for this Court to step in and provide guidance to the lower courts. For, as we explained in our petition at 7-16, until the decision below, every federal appeals court and state court of last resort to address the issue held that the Safety Act does not *expressly* preempt common law claims. The United States, moreover, agrees with those decisions. *See* Pet. at 24.

We will not address VW's express preemption argument on the merits further here. Our petition, Congress' plain words, and the unanimous appellate decisions all confirm both the error of the ruling below and the need for review. We must note, however, that two broad contentions advanced by VW in support of express preemption underline the critical federal questions at stake.

First, VW argues that section 1392(d) expressly preempts common law claims because, under *Cipollone*, *all* statutory language preempting state "law," "requirements," or "standards" *necessarily* preempts state common law claims. Opp. at 20. That argument, however, flies in the face of this Court's rulings and, if adopted, would result in a massive displacement of state common law. In fact, *Cipollone* held that state common law claims are *not* preempted by a 1965 statute providing that "[n]o statement relating to smoking and health . . . shall be *required*" by the States. *Id.* at 2618. And this Court's recent decision in *Medtronic Inc. v. Lohr*, 116 S. Ct. 2240 (1996), makes plain that *not* all statutory references to state "requirements" *necessarily* apply to common law claims.[4]

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[4]Volkswagen's suggestion, Opp. at 18, that review should be denied because the Idaho Supreme Court's decision below predated *Medtronic* is particularly odd, since the Idaho Supreme Court considered its ruling compelled by *Freightliner*, which was not overruled by *Medtronic*. *See* Pet. App. 7. We would not object, however, if this Court granted certiorari, vacated, and remanded for reconsideration in light of *Medtronic*. In *Ketchum v. Hyundai Motor*

Second, VW argues that section 1397(k) does not preserve common law claims because "general savings clauses" -- regardless of their terms -- *only* preclude a finding implied *field* preemption and *never* prevent a court from abnegating *any* state law that, in the court's view, conflicts with federal law. Opp. at 24-25. This argument would render Congress' words meaningless, dislodge preemption analysis from its moorings of Congressional intent, and leave Congress powerless to preserve *any* specific state law. It is hard to imagine an argument that raises more fundamental and important federal questions.

4. Volkswagen's final argument -- that this Court has denied review in other Safety Act cases -- simply ignores the facts. Three years ago, this Court granted review in *Freightliner*, which, by all appearances, seemed to present exactly the same question presented in this case: whether the Safety Act preempts common law claims. *See* footnote 3 *supra*. The Court ultimately decided the case on other grounds. *See id.*, 115 S. Ct. at 1487 n.3.

Since *Freightliner*, this Court has declined review in two Safety Act cases -- *Tebbetts*, 165 A.2d at 345, and *Montag v. Honda Motor Co.*, 75 F.3d 1414 (10th Cir.), *cert. denied*, 117 S. Ct. 61 (1996). In *Tebbetts*, the respondent successfully opposed review on the ground that the New Hampshire Supreme Court's decision finding no preemption was the first ruling by a state court of last resort or a federal appeals court on the preemptive effect of the Safety Act since this Court clarified the limits on implied preemption in *Cipollone* and *Freightliner* -- and that there was, therefore, no post-*Cipollone* conflict. Brief in Opposition at ii, *Tebbetts*, No. 95-709 (October Term, 1995). In *Montag*, the Tenth Circuit created such a conflict by finding preemption, but Ford successfully argued that review should be denied because the case was decided on alternative grounds and did not squarely present the

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Company, 57 Cal. Rptr. 2d 595 (Cal. App. 1996), the California Court of Appeal, drawing "guidance" from *Medtronic*, recently held that the Safety Act expressly preserves all common law claims.

preemption issue. Respondents' Brief in Opposition at v, *Montag* (No. 95-1885). Ford said this Court "should await a case that more appropriately presents the issue for consideration." *Id.* at 18.

This is that case.

CONCLUSION

For these reasons and the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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